Agenda E-18
Rules
September 2004

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on June 17-18, 2004. Robert D. McCallum, Associate Attorney General, attended the meeting on behalf of the Deputy Attorney General, James B. Comey. All the other members attended.

Representing the advisory rules committees were: Judge Samuel A. Alito, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge A. Thomas Small, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Lee H. Rosenthal, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Edward E. Carnes, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Jerry E. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office; James Ishida and Robert P. Deyling, attorney advisors

in the Administrative Office; Professor Steven S. Gensler, Supreme Court fellow at the Administrative Office; Joe Cecil of the Federal Judicial Center; and Professor R. Joseph Kimble, Joseph F. Spaniol, and Professor Geoffrey C. Hazard, consultants to the Committee.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 4, 26, 27, 28, 32, 34, 35, 45, and new Rules 28.1 and 32.1 with a recommendation that they be approved and transmitted to the Judicial Conference. The advisory committee accumulated the proposed amendments over several years, so that they could be addressed at one time. The proposals were published for comment in August 2003. More than 500 comments were submitted on the proposed amendments and new rules. Most of the comments were made by judges and lawyers in the Ninth Circuit and were directed at proposed new Rule 32.1. Fifteen witnesses testified at a public hearing on the proposed amendments held in Washington, D.C.

The proposed amendment to Rule 4 clarifies when a district court may reopen the time to file a appeal. Under the amendment, if notice under Civil Rule 77(d) is not received within 21 days after entry of the judgment or order, a party may file a motion to reopen the time to appeal: (1) within 180 days after judgment or order is entered, or (2) within seven days after the party receives notice under Civil Rule 77(d), whichever is earlier. The amendment eliminates the ambiguity that arose from revisions of the rule made as part of the 1998 comprehensive restyling project. The amendment also requires formal notice under Civil Rule 77(d), resolving a circuit split over the type of notice that must be received to trigger the prescribed seven-day period.

The proposed amendments to Rules 26 and 45 correct the references to President George Washington's Birthday.

Under the proposed amendments to Rule 27, the typeface and type-style requirements governing briefs and other papers under Rule 32 are made applicable to motions. The amendments promote uniformity and prevent potential abuses involving the use of small type-size print to circumvent the rule's page limitations.

Proposed new Rule 28.1 establishes comprehensive procedures for cross-appeals based on the existing requirements governing briefs not involving cross-appeals and the practices of the large majority of circuits. In accordance with most circuit rules, the proposed national rule recognizes the filing of four types of briefs in a case involving a cross-appeal, *i.e.*, the "appellant's principal brief," "appellee's principal and response brief," "appellant's response and reply brief," and "appellee's reply brief." The rule limits the length of each type of brief again consistent with the practices of most circuits. The limits on the "appellee's principal and response brief" are 2,500 words longer than the typical principal brief in recognition that the brief serves not only as a principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. Cross-appeal provisions contained in Rules 28, 31, and 32 are transferred to the new rule, and conforming cross-references to the new rule are added in Rules 32 and 34.

The proposed amendments to Rule 35(a) resolve an inter-circuit conflict regarding the make-up of the vote for a hearing or a rehearing en banc. Present Rule 35(a) and 28 U.S.C. § 46(c) both require a vote of a "majority of the circuit judges who are in regular active service" to hear a case en banc. In determining whether a disqualified, recused, or otherwise unavailable judge is included when calculating the majority of judges, courts of appeals have interpreted differently the meaning of "majority" and have adopted different counting methods based on their interpretation of what constitutes a "majority" in their local rules.

In 1973, the Judicial Conference proposed an amendment to section 46(c) that would have established a uniform standard by excluding disqualified judges when determining a majority (JCUS-SEP 73, p. 47). In 1984, the Conference rescinded the 1973 proposal and recommended that each court of appeals clearly describe its counting method without advocating any specific method (JCUS-SEP 84, pp. 55-56). In 1988, the American Bar Association approved a resolution supporting an amendment to Rule 35(a) that would exclude disqualified judges from the "majority."

The advisory committee was prompted to revisit the issue by a decision of the Eleventh Circuit Court of Appeals in *Gulf Power Co. v. Federal Communications Commission*, 226 F.3d 1220 (11th Cir. 2000), in which a petition for an en banc hearing was denied even though six of the seven judges actually voting favored an en banc hearing. In addition, the Judicial Improvements Act of 2002 (H.R. 3892, 107th Cong., 2d Sess.) included an amendment to section 46(c), specifying the exclusion of recused judges from the "majority." But at the request of the Judicial Conference, Congress decided not to go forward with the amendment in deference to the advisory committee's consideration of the issue under the Rules Enabling Act.

In 2002, the advisory committee surveyed the counting method practices of the courts of appeals. It found the courts nearly evenly split between those that adopted an "absolute majority" counting method, in which disqualified judges were included in determining a majority, and those that adopted a "case-majority" counting method, in which disqualified judges were excluded in determining a majority.

The proposed amendments adopt the case majority approach and make clear that disqualified judges are not counted in the "base" in calculating whether a "majority" of the circuit judges have voted in favor of an en banc hearing. For example, in a case in which five of

a circuit's twelve active judges are disqualified, only four judges (a majority of the seven non-disqualified judges) must vote to hear a case en banc. Consistent with the majority quorum requirements of 28 U.S.C. § 46(d), the total number of non-recused judges voting on the en banc petition must be a majority of the active judges in all cases.

The advisory committee concluded that the "case majority" method of counting votes represents the best interpretation of the phrase "a majority of the circuit judges ... in regular active service" that appears in both Rule 35(a) and 28 U.S.C. § 46(c). The latter provision not only prescribes that "a majority of the circuit judges ... in regular active service" may vote to rehear a case en banc, but it also provides that when a case is heard en banc, the en banc court "shall consist of all circuit judges in regular active service." Because recused judges obviously cannot participate in the rehearing, the latter reference to "all circuit judges in regular active service" cannot include recused judges. The advisory committee believes that this same phrase, as it appears in the portion of 28 U.S.C. § 46(c) governing a vote to rehear a case en banc, should be given the same interpretation.

The advisory committee also believes that the case majority method is more appropriate than the "absolute majority" method, because under the absolute majority method a recused judge is treated for practical purposes as affirmatively voting against the en banc hearing petition. In certain cases, a recused judge's passive "negative vote" might prevent a rehearing, thereby leaving the underlying judgment intact and eliminating the possibility that the judgment might be overturned by an en banc court. The result seems inconsistent with the purpose of the rule and underlying statute to prevent a disqualified judge from having any effect on the outcome of a particular case. The result also seems unfair to the parties in the particular case that cannot be heard en banc because of recusals. The advisory committee is aware of an instance in which

recusals blocked en banc review of a death penalty case, even though a majority of the nonrecused judges wanted to hear the case en banc.

Several commenters expressed concern that adopting a case majority counting method might increase the number of en banc hearings. The advisory committee found no indication, however, that the courts of appeals following the case majority method have experienced an increased number of en banc hearings. As a practical matter, the number of en banc hearings is regulated by the members of a court through their votes, and the members of a court can control the number of hearings under any counting method. The advisory committee also considered concerns that the case majority approach could lead to en banc determinations by less than a majority of the judges, establishing precedent not fully endorsed by a majority of the court. But the same possibility arises under the court majority rule in even more extreme form; when many judges are recused, the court majority rule makes the panel opinion unreviewable en banc — hence it becomes the law of the circuit, even though subscribed to by as few as two judges. In either event, the full court is not prevented from reconsidering the precedent in a later case.

The advisory committee concluded that there is no justification for treating similarly situated litigants differently among the courts of appeals. The rule should be interpreted and applied uniformly throughout the nation. The advisory committee concluded that the case majority method is the fairer method and interpretation of section 46(c) and Rule 35(a), and it should be adopted uniformly.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 4, 26, 27, 28, 32, 34, 35, 45, and new Rule 28.1 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Appellate Procedure are in Appendix A with an excerpt from the advisory committee report.

Informational Items

Rule 32.1 — Citation of Unpublished Opinions

Proposed new Rule 32.1 permits the citation of opinions, orders, or other judicial dispositions that have been designated as "not for publication," "non-precedential," or the like and supersedes limitations imposed on such citation by circuit rules. The practices governing citation of unpublished opinions vary among the circuits, with some permitting citation, others disfavoring citation but permitting it in certain circumstances, and others prohibiting citation. Nine circuits now permit citation of unpublished opinions, at least when, in the judgment of counsel, there is no precedential opinion on point.

In proposing national procedural rules governing the practices of courts of appeals, the advisory committee has recognized the needs of courts for flexibility to account for differing local circumstances. But after carefully reviewing each argument in favor of local autonomy, the advisory committee concluded that the reasons for a uniform rule addressing citation of unpublished opinions clearly outweighed the arguments for maintaining the present system.

The proposal submitted by the advisory committee is very limited. The advisory committee expressly took no position on whether unpublished opinions should have any precedential value, leaving that issue for the circuits to decide. For this reason, the advisory committee declined to support a proposal that permitted but disfavored citation of unpublished opinions, because such a rule might be interpreted as taking a formal position on the precedential value of such opinions, compromising the proposed rule's substantive neutrality. Consistent with its neutral role, the rule takes no position on whether a court may bar its judges from citing unpublished opinions.

Background of Courts' Practices Involving Citation of Unpublished Opinions

The genesis of the courts of appeals' policies governing citation of unpublished opinions traces back to the early 1970's when the Federal Judicial Center was tasked to review the growing number of published opinions. In 1972, the Federal Judicial Center Board recommended that the Judicial Conference adopt a policy encouraging courts of appeals to limit the number of opinions submitted for publication. As part of its report, the Board also recommended that courts prohibit citation to unpublished opinions. The Conference agreed to encourage courts to develop plans to address the problems following on the publication of so many opinions.

In 1974, the Judicial Conference reported that the various plans developed by the courts of appeals were successfully eliminating unnecessary publication of opinions (JCUS-MAR 74, pp. 12-13). The plans contained provisions governing citation of unpublished opinions, many of them quite different from each other. The Conference raised concerns with the lack of uniformity and noted with approval the Committee on Court Administration's report "that further experimentation may well lead to the amendment of the diverse circuit plans and that *eventually a somewhat more or less common plan might evolve*." (JCUS-MAR 74, p. 13; emphasis added.) The Committee on Court Administration had noted that some courts had adopted a policy prohibiting citation to unpublished opinions, and it suggested that courts may eventually adopt a uniform policy permitting citation of unpublished opinions.

The Judicial Conference's predisposition favoring uniform procedures governing citation of unpublished opinions took on a more affirmative cast in 1995. The *Long Range Plan for the Federal Courts* recommended that "the relevant committees of the Judicial Conference should work together to develop a *uniform set of procedures and mechanisms* for access to circuit court opinions, guidelines for publication or distribution, and *clear standards for citation*." (Long Range Plan, Dec. 1995, p. 70; emphasis added.) The Long Range Plan's recommendation was

itself based on a proposal in the *Report of the Federal Courts Study Committee*, which recommended the creation of an ad hoc committee to review the policy on unpublished opinions. The Study Committee expressed concern with practices barring citation of unpublished opinions. It recognized that the "policy in courts of appeals of not publishing certain opinions, and concomitantly restricting their citation, has always been a concession to perceived necessity" and that technological advances in publishing opinions supported a change in that policy. (Report of the Federal Courts Study Committee, April 1990, p. 130.)

Department of Justice's and Others' Requests to Amend the Rules

In 2001, the Department of Justice requested the advisory committee to amend the rules to establish uniform procedures permitting citation of unpublished opinions. The Department cited examples of unpublished cases involving recurring issues decided differently by different courts of appeals (and sometimes by the same court of appeals) without knowledge of the previous dispositions. For the same and other reasons, many bar associations, attorneys, and members of the public, and numerous law review and bar journal articles have been urging for a long time a review of the disparate citation practices. "Unpublished" opinions are now widely available both in electronic and print formats. The E-Government Act of 2002 requires all federal courts to post all opinions, including "unpublished" opinions, on the court web site.

Mindful of the Judicial Conference's Long Range Plan, responding to the Department of Justice's and others' requests, and in consideration of the technological change affecting the availability of "unpublished" opinions, the advisory committee initiated the rulemaking process. After reviewing the citation practices of the courts of appeals and the substantial literature on the issue, the advisory committee proposed for publication for public comment a new rule preventing courts from barring citation of unpublished opinions.

The proposed new rule was published in August 2003. More than 500 comments were submitted, a majority from lawyers and judges in the Ninth Circuit. The great majority of these comments were opposed to the proposed rule. But the proposed new rule was supported by major national bar organizations, including the American Bar Association and the American College of Trial Lawyers, by bar organizations in New York and Michigan, by the Department of Justice, and by such public interest organizations as Public Citizen Litigation Group and Trial Lawyers for Public Justice.

Justification for the New Rule

Critics of rules prohibiting or restricting the citation of unpublished opinions — rules that forbid a party from calling a court's attention to the court's own official actions — have asserted that such rules are inconsistent with basic principles underlying the rule of law. They have contended that in a common law system, the presumption is that a court's prior decisions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior rulings. Moreover, in an adversary system, the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients. The advisory committee generally agreed with these principles, while taking no position on whether a class of opinions appropriately may be designated by circuit rule as non-precedential.

The advisory committee rejected claims that adoption of rules permitting citation would result in dire consequences. Courts that have permitted citation of unpublished opinions simply have not experienced any serious adverse consequences. The advisory committee concluded that the promulgation of uniform citation rules was timely, consistent with the views of the Committee on Court Administration in 1972, the Judicial Conference in 1974, the Federal Courts

Study Committee in 1992, and the Judicial Conference again in 1995, which had urged that uniform citation standards be prescribed.

The practical effect of no-citation rules can be significant. The advisory committee found the evidence overwhelming that unpublished opinions can be a valuable source of "insight" and "information." They are helpful in addressing recurring issues, which involve similar fact patterns. They can be particularly helpful to district judges who must exercise discretion in applying relatively settled law to an infinite variety of facts while at the same time striving for uniformity, *e.g.*, dispositions involving sentencing guideline decisions. On the other hand, no-citation rules forbid attorneys from bringing to the court's attention information in unpublished opinions that might help their client's cause. No-citation rules prohibit attorneys from explaining how substantive legal rules have actually been applied by the court and in what actual — not hypothetical — circumstances the issue at hand has been coming before the court. No-citation rules are especially troublesome when an unpublished opinion has been erroneously characterized as routine, even though some courts mitigate this problem by adopting procedures allowing a court to reconsider publishing a particular opinion. The advisory committee received substantial information showing that lawyers, district court judges, and appellate judges regularly read unpublished opinions despite local prohibitions against citing them. Citation of unpublished opinions by lawyers and judges provided further evidence of the value of unpublished opinions.

Addressing Arguments Against Proposed New Rule 32.1

Three major concerns were raised about the uniform citation rule published for comment in August 2003. First, it was asserted that no-citation rules do not deprive the courts or parties of anything of value. Unpublished opinions do not establish a new rule of law or expand, narrow, or clarify an existing rule of law. They merely inform the parties and the lower court of the

reasons for the decision of the court of appeals. The advisory committee, however, found many examples of unpublished opinions bearing significant value and insights. Moreover, the assertion that unpublished opinions have no value cannot be reconciled with the argument that attorneys and courts would be compelled to spend much greater time on research if unpublished opinions could be cited. Presumably, no research would be necessary if unpublished opinions truly had no value.

Second, it was asserted that the proposed new rule will result in judges issuing more one-line dispositions that provide no explanation or in judges spending more time in drafting unpublished opinions. But numerous state and federal courts have abolished or liberalized no-citation rules, and there is no evidence that any court has experienced any of these consequences. Significantly, the advisory committee received no comment from any judge from a circuit that permitted citation of unpublished opinions asserting that the citation policy has had bad consequences. It is more likely that the publication of all "unpublished" opinions by West and other publishers plays a greater role in a judge's decision to spend more time on drafting an opinion than the possibility that it might be cited.

Third, it was contended that the proposed new rule will increase the cost of legal representation by increasing the body of law that must be searched by responsible counsel. Yet this problem has not materialized in the courts allowing citation. Moreover, the support of major bar organizations and public interest groups undermines the contention.

No-citation rules may have been necessary to level the playing field in years past when access to unpublished opinions was limited to large firms or institutional entities, but they are no longer justifiable today. They can lead to arbitrariness and injustice when similar cases are seemingly treated differently. They undermine accountability. Moreover, such rules undermine

public confidence in the judicial system by leading some litigants and members of the public to suspect that unpublished opinions are being used for improper reasons.

Several courts of appeals have expressed concerns with some aspects of the proposed rule. These concerns are mainly centered on the belief that permitting citation of non-precedential opinions will significantly increase the workload of the courts. In response to that increase, these courts predict that time to disposition will increase as will the number of summary judgment orders. These concerns can be tested empirically in the nine circuits that now permit citation. In an effort to reach a greater consensus among the courts, and in deference to the circuits that oppose the proposed rule, the Committee decided to defer approving the proposed new rule in favor of such an empirical study. The Committee concluded that some further consideration by the advisory committee would be helpful once the empirical study was completed. This further consideration would take into account the results of the empirical study but need not be limited to empirical issues. The Committee was particularly interested in the advisory committee's further consideration of the application of the proposed rule to state court unpublished opinions. The Committee was careful to state that its action was neutral and should not be understood to express disapproval of the proposal.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006 and Official Forms 6G, 16D, and 17 with a recommendation that they be approved and transmitted to the Judicial Conference. The scheduled public hearing on the amendments was canceled because no one requested to testify.

The proposed amendment to Rule 1007 requires the debtor in a voluntary bankruptcy case to submit with the petition a list of the names and addresses of each person and entity entitled — under specified schedules prescribed by the Official Forms — to receive notice of the bankruptcy filing. Virtually all courts have adopted a local rule requiring the debtor to provide such mailing information, commonly called the "mailing matrix." The information required by the amendment ensures that all entities entitled to receive notice will be mailed notices, including codebtors and nondebtor parties to executory contracts and unexpired leases.

Under the proposed amendments to Rule 3004, the debtor and trustee may not file a proof of claim as provided for in § 501(c) of the Bankruptcy Code until the creditors' opportunity to file a proof of claim has expired. The amendments also delete the present provision authorizing a creditor to file a proof of claim superseding an earlier proof of claim filed by a debtor or trustee, because under the amendments a debtor or trustee may no longer file a proof of claim before the time to file a claim by the creditor has expired.

The proposed amendments to Rule 3005(a) conform to the proposed amendments to Rule 3004 and delete, because it is unnecessary, the language in the existing rule that permits a creditor to file a proof of claim that supersedes a claim filed on behalf of the creditor by a codebtor. The proposed amendments to Rule 3004 and § 501 of the Code obviate the need for the existing language, because a codebtor may no longer file a proof of claim before the creditor's time to file has expired.

The proposed amendments to Rule 4008 establish deadlines for filing a reaffirmation agreement. The amendments also eliminate the deadlines for setting and holding the discharge hearing and instead provide a court with discretion to set and hold the hearing as appropriate under the circumstances of each case. Any party to the reaffirmation agreement may file it with the court.

The proposed amendments to Rule 7004 explicitly authorize a clerk of court to issue a summons by electronic means, including the sealing of the summonses. The amendments address only the issuance of the summons and not service of the summons, which must be accomplished in the traditional manner.

Rule 9006 would be amended to clarify the method of counting the additional three days provided to respond if service is by mail or by one of the methods prescribed in Civil Rule 5(b)(2)(C) or (D). The counting of the three days commences after the prescribed period to respond otherwise expires. Similar amendments are being proposed to Civil Rule 6.

The proposed revisions to Official Forms 6-G, 16D, and 17 were not published for comment because they are technical and conforming amendments. The revision to Schedule G of Form 6 deletes a note reminding the preparer that entities listed on the schedule will not automatically receive notice of the filing. The note is no longer necessary in light of the proposed amendment of Rule 1007, which requires a listing of names and addresses of persons to whom notice of the filing is to be sent. The effective date of the amendment to the form should coincide with the effective date of the proposed amendments to Rule 1007, *i.e.*, December 1, 2005.

The proposed amendments to Forms 16D and 17 delete cross-references to recently abrogated Forms.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

a. Approve the proposed amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9006, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law;

b. Approve the proposed amendments to Official Forms 16D and 17 to take effect on December 1, 2004; and

c. Approve the proposed amendments to Schedule G of Official Form 6 to take effect on December 1, 2005.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and Official Forms are in Appendix B with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 1009, 2002, 4002, 7004, 9001, and Schedule I of Official Form 6 with a recommendation that they be published for comment.

The proposed amendments to Rule 1009 require a debtor to submit a corrected statement of social security number when the debtor learns that a previously submitted social security number is inaccurate and to provide notice of the corrected number to all others who had received the inaccurate number.

Under the proposed amendments to Rule 2002(g), notice providers (newly defined entities under proposed amendments to Rule 9001(9)) may enter into agreements with creditors on the manner and mailing address to which service may be effected. The amendments facilitate the transmission of notices to creditors that operate nationally by permitting a notice provider to send a creditor all notices to a centralized, agreed-upon electronic mailing address. Confirmation that an electronic notice was transmitted and received is no longer required under the proposed amendments to Rule 9036 approved for publication by the Committee at the June 2004 meeting.

Because the amendments to Rules 2002(g), 9001(9), and 9036 could save the courts considerable amounts of money in mailing and administrative expenses, the comments on the amendments will be considered on an expedited basis with the advisory committee making its recommendation on approval of the amendments to the Committee as soon as practicable after the close of the comment period. The Committee will then consider the matter and take action in time for a recommendation to the Judicial Conference for action at its March 2005 meeting. The

Supreme Court could then promulgate these rules amendments by May 1, 2005, with the amendments becoming effective on December 1, 2005, absent congressional action to the contrary.

The proposed amendments to Rule 4002 implement § 521 of the Bankruptcy Code, which requires the debtor to "surrender to the trustee" information and documentation of income and financial assets at the § 341 creditors' meeting. The amendments specifically require the debtor to bring a government-issued picture identification and evidence of a social security number. Unless the trustee instructs otherwise, the debtor must also bring evidence of current income (most recent pay stub), the most recently filed federal income tax return, including any attachments, and statements of each depository and investment account.

The proposed amendments to Rule 7004 make clear that the debtor's attorney must be served with a copy of any summons and complaint filed against the debtor without regard to the manner in which the summons and complaint was served on the debtor, including personal service. Under the current rule, the debtor's attorney must be served only if the summons and complaint was served on the debtor by mail. Service on the debtor's attorney may be made by any method permitted under Civil Rule 5(b).

The proposed amendments to Rule 9001 add a new definition of "notice provider." The amendments are proposed in conjunction with the proposed amendment to Rule 2002, which facilitates the high-volume mailing of notices by an entity to a national creditor at a single electronic mailing address.

Schedule I of Official Form 6 would be amended to require the disclosure of the current income of the non-filing spouse of a debtor in a chapter 7 case.

The Committee approved the recommendations of the advisory committee to publish the proposed amendments to Rules 1009, 2002, 4002, 7004, 9001, and Schedule I of Official Form 6

to the bench and bar for comment. The Committee had earlier approved publishing for public comment proposed amendments to Rule 5005(c) and Rule 9036, which will be considered along with these amendments. As noted above, the advisory committee and the Committee will be considering the amendments to Rule 9036 on an expedited basis along with the proposed amendments to Rules 2002(g) and 9001(9).

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 6, 27, and 45 and proposed amendments to Supplemental Rules B and C with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2003. The scheduled public hearing on the proposed rules amendments was canceled because no one asked to testify.

The proposed amendment to Rule 6(e) clarifies the method of determining the time to respond when the time is extended after service by mail, by leaving with the clerk of court, by electronic means, or by other means consented to by the party served. It was unclear whether the additional three days provided in the rule were to be added before or after the prescribed period. The amendment makes clear that three days are added after the prescribed period otherwise expires. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days.

The proposed amendment to Rule 27 corrects outdated references to former Rule 4(d). The amendment makes clear that all methods of service authorized under Rule 4 can be used to serve a petition to perpetuate testimony.

Under the proposed amendment to Rule 45, a deposition subpoena must state the method for recording the testimony. The amendment ensures that a nonparty deponent has notice of the

recording method, providing the deponent an opportunity to raise objections in a timely and efficient manner.

The proposed amendment to Supplemental Rule B fixes the time for determining whether a defendant is "found" in the district at the time when the verified complaint and the accompanying affidavit are filed. The amendment is intended to prevent a defendant from defeating attachment and evading a security device by waiting until a complaint is filed before appointing an agent to receive service of process.

The proposed amendments to Supplemental Rule C are technical in nature and correct an oversight contained in amendments made in 2000.

The Committee concurred with the advisory committee's recommendations.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 6, 27, and 45, and proposed amendments to Supplemental Rules B and C and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Civil Procedure are in Appendix C with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Rules 16, 26, 33, 34, 37, 45, 50, Supplemental Rules A, C, and E, and a new Supplemental Rule G, and revisions to Form 35 with a recommendation that they be published for comment. The advisory committee also proposed a style revision of Rules 38 through 63 — except Style Rule 45 which was approved at an earlier meeting — with a recommendation that they be published for public comment, but at a later date. (The Committee had earlier approved publishing for comment proposed style amendments to Rules 1 through 37 and 45.) In addition, the advisory committee proposed amendments to eleven of the restyled rules to be published at the same time as the

comprehensive style revision, but as a separate set of proposals. These proposed amendments emerged from the work on the style revision as modest, noncontroversial clear improvements. Because they arguably exceed the scope of the style project by changing the accepted meaning or effect of the rules, the advisory committee recommended that they be published at the same time as, but separately from, the comprehensive style revision of the rules.

Discovery of Electronically Stored Information

The proposed amendments to Rules 16, 26, 33, 34, 37, 45 and revisions to Form 35 are aimed at discovery of electronically stored information. The advisory committee has been studying these problems intensively since 2000. Bar organizations, attorneys, and members of the public have urged the advisory committee to address the serious problems arising from discovery of computer-based information. The discovery of electronically stored information raises markedly different issues from conventional discovery into paper. Electronically stored information is characterized by exponentially greater volume; computer information, unlike paper, is dynamic; and electronic data, unlike paper, may be incomprehensible when separated from the system that created it. Developing case law is not consistent. Disparate local rules have emerged, and more are under consideration. Without national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop, and will be particularly confusing and debilitating to large organizations. Even small organizations and individuals may be overwhelmed by the uncertainty, expense, delays, and burdens of such discovery. The costs of complying with unclear and at times vague discovery obligations that vary from district to district in ways unwarranted by local variations practice are becoming increasingly untenable.

The advisory committee has monitored the experiences of the bar and bench with these issues for several years. It has found that the discovery of electronically stored information is

becoming more time consuming, burdensome, and problematic. Unless timely action is taken, the federal discovery rules will become increasingly removed from practice, and similarly situated litigants will continue to be treated differently depending on the federal forum.

The proposed amendments to Rule 16 and Rule 26(f), and Form 35 present a framework for the parties and court to give early attention to issues relating to electronically stored information, the preservation of evidence, and privilege. Under the proposed amendment to Rule 26(f), the parties are to include in their conference the preservation of information for discovery and are to include in their proposed discovery plan any issues relating to disclosure or discovery of electronically stored information, including the form of production, and whether the parties can agree on approaches to production that protect against privilege waiver. Form 35 is amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court. The scheduling order under Rule 16, as amended, may include provisions on the disclosure or discovery of electronically stored information and an order adopting the parties' agreements for protection against waiving privilege.

A proposed amendment to Rule 26(b)(2) clarifies the obligations of a responding party to provide discovery of electronically stored information that is not reasonably accessible, an increasingly disputed aspect of such discovery. Under the amendment, a party need not produce electronically stored information that is not reasonably accessible, such as deleted information, information kept on backup tapes for disaster recovery purposes, or legacy data remaining from systems no longer used. If the requesting party moves for the production of such information, the responding party has the burden to show that the information is not reasonably accessible. Even if the information is not reasonably accessible, a court may order discovery for good cause and may impose appropriate terms and conditions.

The volume of electronically stored information produced in response to discovery can be enormous, and certain features of such information make it more difficult to review for privilege than paper discovery. The inadvertent production of privileged material is a substantial risk. The proposed amendment to Rule 26(b)(5) sets up a procedure to apply when a responding party asserts a production of privileged information without an intent to waive the privilege. The proposed amendment does not address how to resolve whether the privilege has been waived or forfeited, respecting the special statutory process for adopting rules that modify privilege. By providing a procedure to allow the responding party to assert privilege after production and to require the return of the material pending resolution of the claim, the amendment helpfully addresses the burden of privilege review, which is particularly acute in electronic discovery.

The proposed amendment to Rule 33 clarifies that an answer to an interrogatory involving review of a business record should also address electronically stored information and permits the responding party to answer by providing access to the information.

Under the proposed amendments to Rule 34, electronically stored information is explicitly recognized as discoverable matter distinct from "documents." The term "documents" cannot continue to be stretched to accommodate all the differences between paper and electronically stored information. Rule 34 is also amended to authorize a requesting party to specify the form of production, such as in paper or electronic form, or a particular electronic form. The rule provides that the responding party may object to that request and provides that absent court order, party agreement, or request for a specific form for production, a party may produce the information in the form in which the party ordinarily maintains it or in an electronically searchable form. Absent a court order, the party need only produce the information in one form.

The proposed amendments to Rule 37 respond to a unique and necessary feature of computer systems — the automatic recycling, overwriting, and alteration of electronically stored information. This is a different problem from that presented by information kept in the static form that paper represents. The routine recycling of backup tapes used for disaster recovery purposes, for example, is necessary to the operation of the information systems used by private and public entities. At the same time, litigants' right to obtain evidence must be protected. There is great uncertainty as to whether and when a party may continue some or all of the routine operation of its computer system without risk of sanctions. The advisory committee has heard strong arguments in support of better guidance in the rules.

Rule 37(f) states that a court may not impose sanctions on a party under the civil rules for a party's failure to provide electronically stored information in discovery if the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; the information was lost because of the routine operation of the party's computer system; and the party did not violate an order in the action requiring it to preserve the information. The advisory committee is specifically seeking comment on the level of fault necessary to make a party ineligible for this narrow “safe harbor” from sanctions under the rules. The proposed amendment is framed in terms of a party's negligent failure to prevent the loss of information in the routine operation of a computer system. The advisory committee is seeking comment on whether the proposal should preclude a court from imposing sanctions under the rules for the loss of information as a result of the routine operation of a computer system unless the deletion or loss of this information was intentional or reckless or a court order was violated.

The proposed amendments to Rule 45 conform the provisions for subpoenas to changes in other discovery rules related to discovery of electronically stored information.

Proposed Amendments to Rule 50

A party may, after trial, renew a motion for judgment as a matter of law made during trial in accordance with Rule 50(a). The proposed amendment to Rule 50 deletes the requirement that the original motion be made at the close of all the evidence. Many reported appellate decisions continue to wrestle with the problems that arise when a party has moved for judgment as a matter of law before the close of all evidence but has failed to renew the motion at the close of all the evidence. The proposed amendment reflects the belief that a motion made at any time before the case is submitted to the jury serves all of the functional needs served by a motion at the close of all the evidence. As now, the post-trial motion renews the trial motion and can be supported only by arguments that had been made to support the trial motion.

Proposed New Supplemental Rule G on Forfeiture Actions

Proposed new Supplemental Rule G establishes comprehensive procedures governing in rem forfeiture actions. The new rule consolidates the forfeiture in rem procedures located in several admiralty rules and sets up a unified procedural framework solely intended to address asset forfeiture cases. Conforming amendments to Supplemental Rules A, C, and E are also proposed. Representatives from the Department of Justice and National Association of Criminal Defense Lawyers worked with the advisory committee in developing the rule.

Forfeiture actions are presently litigated under various Supplemental Rules, which has caused problems. The Supplemental Rules are primarily designed to handle admiralty actions and present difficult interpretational issues when applied to asset forfeiture actions. Moreover, the Supplemental Rules have not been revised to take account of many of the provisions of the Civil Asset Forfeiture Reform Act of 2000. Nor have the Supplemental Rules been revised to take account of the constitutional jurisprudence dealing with adequate notice. The disconnect between the Supplemental Rules and in rem forfeiture procedures has become acute because the

number of forfeiture actions has increased. The new rule addresses these problems in an integrated and coherent fashion.

Among other things, the new rule sets out procedures governing the filing and response to complaints involving in rem forfeitures, specifies notice provisions — including the anticipated use of the internet to provide a designated government forfeiture web site and a more reliable means of publishing notice — clarifies the timing and scope of certain discovery requests, and establishes procedures to ensure early determination of a claimant's standing.

The Committee approved the recommendations of the advisory committee to publish the proposed rules amendments to the bench and bar for comment.

Proposed Style Revision of Rules 38 through 63, Except Rule 45 (deferred publication)

The proposed amendments are part of a comprehensive style project to clarify the civil rules, improve and modernize expression, and remove inconsistent uses of words and conventions. The style project follows up on the comprehensive style revision of the Federal Rules of Appellate and Criminal Procedure.

The style revision of Rules 38-63, except Rule 45, is the latest installment of style amendments to the Federal Rules of Civil Procedure proposed by the advisory committee. The final package of proposed amendments is expected to be completed this fall for the Committee's consideration at its January 2005 meeting, at which time the entire set of restyled rules will be ready to be published for public comment. The proposed style amendments are not intended to change the meaning or effect of the rules.

The advisory committee also proposed amendments to Rules 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, and 40, addressing minor and noncontroversial amendments to accompany the style proposals. Typical of these noncontroversial amendments are proposals accounting for technological changes, such as adding a reference to an e-mail address on filing papers as well as

telephone and fax numbers. These amendments are so modest and noncontroversial that they could reasonably have been included as style changes in the overall revision of the rules, but they will be published separately consistent with the Committee's stringent policy that only pure style changes be included in the comprehensive revision.

The Committee approved the recommendations of the advisory committee to publish the proposed amendments to the bench and bar for comment to be published at a later date as part of a comprehensive style revision of the entire set of rules and a separate package of noncontroversial amendments that arguably change the meaning or effect of a rule.

Informational Item

Senator Herb Kohl (D-Wis.) had introduced legislation that would require a court to make specific findings before settlement agreements can be sealed (Sunshine in Litigation Act of 2003, S. 817, 108th Cong., 1st Sess.). Early in 2003, Senator Kohl requested the Judicial Conference to study the need for a rule amendment to address this issue. At the request of the advisory committee, the Federal Judicial Center undertook an empirical study of sealing settlement practices in nearly half the district courts. On December 16, 2003, Director Mecham, Secretary to the Judicial Conference, sent Senator Kohl a letter reporting the status of the Center's study and its preliminary findings, which showed a very low incidence of settlement agreements sealed by court order. The Center completed the study in April 2004. The findings in the completed study do not vary much from the preliminary findings. The advisory committee will review the study at its October 2004 meeting.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and

bar for comment in August 2003. The scheduled public hearing on the proposed rules amendments was canceled because no one asked to testify.

The proposed amendments to Rule 12.2 authorize a court to exclude expert evidence on the issue of the defendant's mental disease, mental defect, or any other mental condition if the evidence is not timely disclosed or if the defendant fails to submit to an examination in accordance with the rule.

The proposed amendments to Rules 29, 33, and 34 permit a court to extend the time for filing the post-trial motion designated in the respective rule, even if the court rules on the extension request after the expiration of the seven days specified in the rule, as long as the motion for an extension is filed within the prescribed seven-day period. Rule 45 would be amended consistent with the proposed amendments to Rules 29, 33, and 34. The amendments remedy the problem caused when a judge fails to act within the specified time period even though the party had filed a timely motion.

The proposed amendments to Rule 32 extend the right of allocution to a victim of a felony offense not involving violence or sexual abuse, permitting the victim to address the court or submit a statement in written form. The amendments provide the court with discretion to limit the number of victims who may address the court in cases involving multiple victims. The advisory committee recognizes that legislation extending the right of allocution to all victims of offenses, including misdemeanor and petty offenses, was passed by the Senate and is pending in the House (H.R. 4342, 108th Cong., 2d Sess.). The advisory committee determined that the best course of action was to proceed in accordance with the rulemaking process. The proposed amendment should be withdrawn prior to the September Judicial Conference session if the pending legislation were to be enacted in the meantime.

The proposed amendment to Rule 32.1 provides the defendant with a right of allocution to speak in mitigation of the penalty to be imposed in a revocation hearing, or a modification hearing in which the terms or conditions of the defendant's probation or supervised release may be modified. The amendment was initially suggested in an opinion by the Eleventh Circuit Court of Appeals, *United States v. Frazier*, 283 F.3d 1242 (11th Cir. 2002).

Proposed new Rule 59 parallels provisions in Civil Rule 72 for handling and appealing a decision by a magistrate judge. The new rule codifies statutory law, case law, and the practices of the courts dealing with the assignment, disposition, and appeal of non-dispositive and dispositive matters handled by a magistrate judge. The new rule was suggested in an opinion by the Ninth Circuit Court of Appeals, *United States v. Abonce-Barrera*, 257 F.3d 959 (9th Cir. 2001). Although the rule distinguishes between "dispositive" and "non-dispositive" matters, it does not attempt to define or otherwise catalog motions that fall within either category.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Criminal Procedure are in Appendix D with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules proposed amendments to Rules 5, 32.1, 40, 41, and 58 with a recommendation that they be published for comment.

The proposed amendments to Rules 5(c), 32.1, and 41 permit the government to transmit certain documents to the court by reliable electronic means, including by facsimile. The amendments recognize that a growing number of courts are accepting electronic filings. In

determining which electronic means are reliable, a court is advised to consider the expected quality, security, and clarity of the transmission.

Under the proposed amendments to Rule 5(c), a magistrate judge may accept an arrest warrant transmitted by reliable electronic means when ordering the transfer of a defendant arrested in a district other than where the offense was allegedly committed to the district where the offense allegedly was committed. The present rule permits a facsimile transmission of the arrest warrant.

Under the proposed amendments to Rule 32.1, a magistrate judge may accept a certified copy of a judgment, warrant, or warrant application by reliable electronic means, including by facsimile, when ordering the transfer of a defendant arrested in a district that does not have jurisdiction to hold a revocation hearing to the district that has jurisdiction to conduct a probation or supervised release revocation or modification hearing.

The proposed amendments to Rule 41 authorize a magistrate judge to issue a search and seizure warrant by reliable electronic means based on information communicated electronically or by telephone.

The proposed amendments to Rule 40 authorize a magistrate judge to set conditions of release for a defendant arrested for violating any condition of release set originally in another district. The present rule authorizes a magistrate judge to set release conditions for a defendant who fails to appear in another district as ordered by the court. The advisory committee concluded that it would be inconsistent to empower a magistrate judge to release an arrestee who had failed to appear altogether, but not to release one who only violated conditions of release in a minor way.

The proposed amendments to Rule 58 clarify the advice that must be given a defendant during an initial appearance.

The Committee approved the recommendations of the advisory committee to publish the proposed rules amendments to the bench and bar for comment.

Informational Item

The advisory committee declined to proceed with amendments to Rule 29 proposed by the Department of Justice that would require a judge to defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. Under the present rule, a judge's ruling on a judgment of acquittal motion, if made before the return of the jury verdict, is rendered unappealable by the Double Jeopardy Clause. The advisory committee concluded that the number of these rulings granting a judgment of acquittal before a jury verdict is relatively small and did not warrant a rule change. The Department of Justice notified the Committee of its intent to ask the Committee to reconsider the proposal at its January 2005 meeting along with some additional empirical information.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules proposed amendments to Rules 404, 408, 606, and 609 with a recommendation that they be published for comment. Each of the proposed amendments addresses a longstanding conflict among the courts of appeals.

The proposed amendment to Rule 404(a) resolves the conflict in the courts about the admissibility of character evidence offered as circumstantial proof of conduct in a civil case. The original purpose of the rule was to bar the admission of character evidence when offered to prove a person's conduct, because the evidence might lead to a trial of personality and cause a jury to decide the case on improper grounds. A limited exception was recognized in criminal cases in deference to the possibility that character evidence might be the defendant's sole defense. Over

time, some courts began extending this limited exception and permitted the use of character evidence in civil cases. Under the amendment, character evidence is never admissible to prove conduct in a civil case. The advisory committee concluded that a clear rule is necessary to avoid the serious risks of prejudice, confusion, and delay that may arise when character evidence is used to prove that a person acted in conformity with the character trait.

The proposed amendments to Rule 408 resolve three longstanding conflicts in the courts about statements and offers made in settlement negotiations admitted as evidence of fault or for impeachment. The amendment does not alter the current rule that such information can be used for other purposes.

Resolving the first conflict, the proposed amendments provide that statements of fault made in the course of settlement negotiations are not barred in a subsequent criminal case, recognizing that such statements can be critical evidence of guilt. The proposed amendments distinguish statements and conduct in settlement negotiations (such as a direct admission of fault) from an offer or acceptance of a compromise settlement of a civil claim. An offer or acceptance of a compromise of a civil claim is excluded from a criminal case because a defendant may offer or agree to settle a litigation for reasons other than a recognition of fault.

Resolving the second conflict, the proposed amendments to Rule 408 also prohibit the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. The advisory committee concluded that broad impeachment would impair the public policy of promoting settlements.

Resolving the third conflict, the proposed amendments to Rule 408 bar a party from introducing its own statements and offers made during settlement negotiations when offered to prove the validity, invalidity, or amount of the claim. Waiving the protection unilaterally would

implicitly disclose the adversary's involvement in the compromise negotiations and might also require testimony from the participating attorneys, leading to disqualifications.

The proposed amendment to Rule 606(b) clarifies whether statements from jurors can be admitted to prove disparity between the verdict rendered and the verdict intended by the jurors. The proposed amendment admits proof of juror statements, but only to show that there was a clerical mistake in the reporting of the verdict.

All courts have permitted jury testimony to prove certain errors in the verdict, even though the text of the rule is silent on the issue. But there is a longstanding conflict among the courts about the breadth of that exception, with some courts finding an exception whenever the verdict has an effect that is different from the result that the jury intended to reach.

The advisory committee concluded that adopting a broad exception permitting proof of juror statements whenever the jury misunderstood or ignored the court's instruction would unduly interfere with juror deliberations and undermine the finality of jury verdicts. In addition, a broad exception was rejected because an inquiry into whether the jury misunderstood or misapplied an instruction improperly intrudes into the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. The proposed amendment does not prevent the court from polling the jurors before the jury is discharged and taking steps to remedy any error that seems obvious when the jury is polled.

The proposed amendment to Rule 609 resolves the conflict among the courts about whether a certain conviction involves dishonesty or false statement that can automatically be used to impeach the witness under subdivision (a)(2). The proposed amendment permits

automatic impeachment only when an element of the crime requires proof of deceit or if the underlying act of deceit can be readily determined from such information as the charging instrument.

Under the amendment, the crime must be a crime of dishonesty or false statement. Evidence of all other crimes is inadmissible under subdivision (a)(2), irrespective of whether the witness exhibited dishonesty or made a false statement in the process of their commission. If the deceitful nature of the crime is not apparent from the statute and the face of the judgment — as, for example, when a state court conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly — a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the witness was necessarily convicted of a crime of dishonesty or false statement.

The Committee approved the recommendations of the advisory committee to publish the proposed rules amendments to the bench and bar for comment.

Informational Item

The Supreme Court substantially revised the Confrontation Clause jurisprudence in *Crawford v. Washington*, No. 02-9410 (Mar. 8, 2004), and recommitted to the advisory committee the hearsay exception amendments to Rule 804(b)(3) approved by the Judicial Conference at its September 2003 session (JCUS-SEPT 03, p. 36). The *Crawford* case has far-reaching implications for all the hearsay exception evidence rules. In reconsidering the proposed amendment after the Supreme Court's action, the advisory committee determined that it was prudent to defer any consideration of an amendment to a hearsay exception until the courts are given some time to address the implications of *Crawford*.

E-GOVERNMENT ACT OF 2002

In 2001, the Judicial Conference adopted a privacy policy governing public access to appellate, bankruptcy, civil, and criminal case files on the recommendation of the Committee on Court Administration and Case Management (JCUS-SEP/OCT 01, pp. 48-50). Under section 205(c) of the E-Government Act of 2002 (Pub. Law No. 107-347), the Supreme Court is to prescribe rules in accordance with the Rules Enabling Act governing the privacy and security concerns arising from public access to electronic case files. The Act does not impose a deadline to prescribe the rules.

The Committee's chair established the E-Government Subcommittee with representatives from each advisory rules committee and liaisons from the Committees on Court Administration and Case Management, Criminal Law, and Information Technology. The subcommittee held its first meeting on the morning before the Committee met. The subcommittee developed a template rule to serve as a model for the various sets of rules. The advisory committees' reporters drafted proposed rules amendments based on the existing Judicial Conference policy and the template, which were considered by the advisory rules committees at their respective committee meetings. The subcommittee then met again to revise the template in light of the various drafts. The new template will be considered by the advisory rules committees at their fall meetings, with an eye to publication in August 2005.

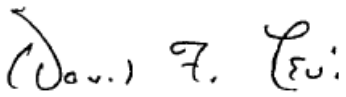
LONG-RANGE PLANNING

The Committee was provided a report of the March 14, 2004, meeting of the Judicial Conference's committee chairs involved in long-range planning.

REPORT TO THE CHIEF JUSTICE

In accordance with the standing request of the Chief Justice, a summary of issues concerning select proposed amendments generating significant interest is set forth in Appendix E.

Respectfully Submitted,



David F. Levi

David M. Bernick	Mary Kay Kane
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James B. Comey	Patrick F. McCartan
Charles J. Cooper	J. Garvan Murtha
Sidney A. Fitzwater	Thomas W. Thrash
Harris L. Hartz	Charles Talley Wells