COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2006
Phoenix, Arizona

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Friday and Saturday, January 6-7, 2006. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Associate Attorney General Robert D. McCallum, Jr.
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida, senior attorney in the Office of Judges Programs of the Administrative Office; Emery Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Judge Thomas S. Zilly, chair of the Advisory Committee on Bankruptcy Rules, was unable to attend in person, but he participated by telephone in the bankruptcy portion of the meeting.

In addition to Associate Attorney General McCallum, the Department of Justice was represented at the meeting by Benton J. Campbell, Counselor to the Assistant Attorney General for the Criminal Division. Alan Dorhoffer attended on behalf of the U.S. Sentencing Commission.

At the committee's request, Professor Alan N. Resnick, Donald B. Ayer, and James C. Duff made presentations to the committee.

INTRODUCTORY REMARKS

Judge Levi reported that he and Professor Coquillette had met with the new Chief Justice. He said that John Roberts will be an excellent Chief Justice and a very good friend to the rules process. He noted that the Chief Justice had served on the Advisory Committee on Appellate Rules for five years, and he would have become the new chair of that committee on October 1, 2005, but for his appointment to the Supreme Court. The committee conveyed its congratulations to Chief Justice Roberts and wished him great success in his new endeavor.

Judge Levi added that Judge Samuel Alito, chair of the Advisory Committee on Appellate Rules until October 1, 2005, had also been nominated to the Supreme Court. The committee congratulated Judge Alito on his selection and wished him well in his confirmation hearings and his future position on the Court.

Judge Levi noted that Professor Patrick Schiltz, reporter to the Advisory Committee on Appellate Rules, had just been nominated by the President to be a district judge for the District of Minnesota. He thanked Professor Schiltz for his excellent service and dedication as a reporter. The committee congratulated Professor Schiltz and wished him success.

Finally, Judge Levi reported that Judge Carl Stewart had been appointed by the Chief Justice as the new chair of the Advisory Committee on Appellate Rules. He emphasized that the high quality of these four appointments reflects very well on the quality of the membership of the rules committees as a whole.

Judge Levi noted that the terms of two members of the Standing Committee had expired on October 1, 2005 – Charles J. Cooper and David M. Bernick. He pointed out that neither was able to attend the meeting, but Professor Coquillette read a letter of appreciation from Mr. Cooper expressing his view that his participation in the work on the committee had been among the most rewarding service of his professional career. Judge Levi added that Mr. Bernick will attend the next committee meeting.

Judge Levi also welcomed Mr. Cox and Mr. Maledon as new members to the committee and read their impressive professional qualifications.

Judge Levi reported that the Judicial Conference at its September 2005 session had approved many rule amendments as part of its consent calendar, including some relatively controversial rules. The amendments included the package of changes to the civil rules relating to discovery of electronically stored information. They also included amendments to the evidence rules, including Rule 408 (use of admissions made in the course of settlement negotiations in a later criminal case) and Rule 609 (automatic

impeachment of a witness by evidence of a prior conviction involving dishonesty or false statement).

Judge Levi explained that a great many changes were needed in the bankruptcy rules to comply with the provisions of the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed to the enormous effort of the Advisory Committee on Bankruptcy Rules in producing a comprehensive package of revised official forms and interim bankruptcy rules. The advisory committee, he said, had effectively completed several years of rules work in just six months. Even organizing the advisory committee into subcommittees to write so many different rules, he said, had been difficult. He noted, too, that the new legislation was very complex and had given rise to many problems of interpretation, making it difficult to draft rules and forms.

He added that he had asked Professor Alan Resnick to attend the meeting and give the members a perspective on the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 and what it means for the rules process. Finally, he noted that Congress was likely to conduct oversight hearings on implementation of the legislation, and the revised bankruptcy rules will be examined closely by Congress.

Judge Levi reported that the Judicial Conference had placed one proposed rule on its discussion calendar for the September 2005 session – new FED. R. APP. P. 32.1, governing citation of judicial dispositions. The rule, he said, was controversial and had encountered opposition from a number of circuit judges. He explained that he and Judge Alito had made a joint presentation on the new rule to the Conference. Judge Levi spoke first about the thorough procedures followed by the rules committees in considering the new rule, and then Judge Alito addressed the substance of the rule.

Judge Levi noted that one chief circuit judge spoke against the rule, arguing that each circuit is different and there is no need for national uniformity on citation policy. The chief judge also objected to having the rule made retroactive. In the end, Judge Levi noted, the Conference approved the rule, but made it prospective only. He said that the new rule was a great achievement, and the work of the Advisory Committee on Appellate Rules had been truly exceptional. The thoroughness of the committee's work, he said, had been very persuasive to the Conference.

Judge Levi reported that the Advisory Committee on Criminal Rules was in the process of considering controversial amendments to two criminal rules – Rule 29 (judgment of acquittal) and Rule 16 (disclosure of information). Under the proposed revision to Rule 29, he explained, a trial judge would normally have to defer entering a judgment of acquittal until after the jury returns a verdict. But the judge could enter a judgment of acquittal before a jury verdict if the defendant waives his or her double jeopardy rights. The revised rule, thus, would allow the Department of Justice to appeal the trial judge's granting of a judgment of acquittal. He noted that the advisory

committee is considering amendments to Rule 16 that would address the recommendation of the American College of Trial Lawyers that the rule specify the government's obligations to disclose exculpatory and impeaching information under *Brady v. Maryland,* 373 U.S. 83 (1963), and *Giglio v. United States,* 405 U.S. 150 (1972).

Judge Levi reported that the Advisory Committee on the Rules of Evidence had under active consideration a new rule governing privilege waiver. He explained that the Advisory Committee on Civil Rules had been concerned for many years that reviewing documents for privilege waiver as part of the discovery process adds substantially to the cost and complexity of civil litigation without real benefit. He said that the new electronic discovery rules just approved by the Judicial Conference contain a "clawback" provision, allowing a party to recover privileged or protected material inadvertently disclosed during the discovery process, and a "quick peek" provision, recognizing agreements between the parties to allow an initial examination of discovery materials without waiving any privilege or protection.

But, he said, the new rules do not address the substantive question of whether a privilege or protection has been waived or forfeited. Nor do they address whether an agreement of the parties or an order of the court protecting against waiver of privilege or protection in a specific case can bind later actions or third parties.

Judge Levi noted that it is very unusual for the rules committees to consider a rule invoking substance because the Rules Enabling Act specifies that the rules may not abridge, enlarge, or modify any substantive right. The Act, moreover, states that any rule creating, abolishing, or modifying an evidentiary privilege can only go into effect if approved by an act of Congress. He reported that he had discussed the problems of privilege and protection waiver with the chairman of the House Judiciary Committee, who responded that the matter was one of great interest to the Congress. The chairman stated that he will send a letter asking the committee to develop a privilege-waiver rule that could eventually be enacted as a statute. Thus, Judge Levi explained, the Advisory Committee on the Rules of Evidence would develop a rule through the regular rulemaking process. After the Judicial Conference and the Supreme Court approve the rule, it would be submitted to Congress for enactment as a statute.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 15-16, 2005.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that legislation had passed the House of Representatives to undo the 1993 amendments to FED. R. CIV. P. 11 (sanctions), thereby requiring a court to impose sanctions for every violation of the rule. The legislation would also require a federal district court to suspend an attorney from practice in the court for a year if the attorney has violated Rule 11 three or more times.

Mr. Rabiej noted that other provisions had been added to the bill on the House floor. One would prohibit a judge from sealing a court record in a Rule 11 proceeding unless the judge specifically finds that the justification for sealing the record outweighs any interest in public health and safety.

Mr. Rabiej pointed out that the House Judiciary Committee's Subcommittee on Commercial and Administrative Law had held an oversight hearing in July 2005 on the judiciary's implementation of the new bankruptcy legislation. He noted that Judge A. Thomas Small, former chair of the Advisory Committee on Bankruptcy Rules, had appeared on behalf of the Judicial Conference and testified as to the substantial amount of work accomplished by the rules committees, other Judicial Conference committees, and the Administrative Office. Mr. Rabiej reported that the testimony had been very impressive, and Judge Small had reassured the Congressional subcommittee that the judiciary would be able to meet all the statutory deadlines.

Mr. Rabiej said that proposed legislation to allow cameras in federal courtrooms at the discretion of the presiding judge was gathering steam. He noted that the Judicial Conference generally opposes cameras in the courtroom.

Mr. Rabiej reported that the rules office had received a request from the Foreign Intelligence Surveillance Court in October to comment on its local rules and to inquire about the rules process in general. He said that he and Professor Capra had reviewed the court's rules, and the court had accepted virtually all their suggested comments.

Judge Levi noted that the Director of the Administrative Office, Leonidas Ralph Mecham, had announced his retirement, and a search committee of judges had been appointed by the Chief Justice to assist him in recommending a replacement.

Mr. McCabe reported that the Administrative Office's rules web site had become very popular. He noted that the staff had posted all rules committee minutes and reports back to 1992, and they will soon post all the committee agenda books back to 1992. He added that all public comments are now being posted as they are received, and the rules office is attempting to locate all the key records of the rules committees – especially minutes and reports – back to the earliest days of the rules program. These records, once posted, should be of substantial benefit to scholars, judges, and lawyers.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of various pending projects of the Federal Judicial Center, as summarized in Agenda Item 4. He directed the committee's attention to two projects involving the federal rules.

First, the Center is examining the impact of the Class Action Fairness Act of 2005 on the resources of the federal courts. The study will begin by determining whether there has been any increase in the number of class actions filed as a result of the Act. Center staff will then examine whether there have been any changes in the workload burdens of the district courts. Finally, they will also look at the burdens imposed by class actions on the courts of appeals. Mr. Cecil reported that there are serious limitations on the data available, and researchers are going through individual case records on a district-by-district basis.

Second, Mr. Cecil described the Center's project to address ongoing confusion regarding the standard of review in patent claims construction. He noted that about one-third of the patent cases are remanded to the district courts on claims construction issues. He said that a survey was being conducted of district judges and attorneys to identify case-management techniques that might improve the claims-construction process and to explore whether some increased ability for interlocutory appeals in patent cases would be helpful.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 9, 2005 (Agenda Item 5).

Judge Stewart reported that the advisory committee had no action items to present. He pointed out that the committee had just completed its marathon efforts to approve new Rule 32.1, governing citation of opinions. He said that the thorough work of the committee, the extent of the public comments, and the invaluable research produced for the committee by the Federal Judicial Center and the Administrative Office had shown that the Rules Enabling Act process had worked exceedingly well.

Judge Stewart noted that the advisory committee would meet next in April 2006 and would address a number of issues described in the agenda book.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Professor Morris and Judge Zilly (by telephone) presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of December 12, 2005 (Agenda Item 6).

Professor Morris reported that the committee had met twice since the last Standing Committee meeting and had conducted numerous teleconferences in order to complete work on the package of official forms and interim rules to implement the omnibus bankruptcy legislation. He pointed out that the interim rules and the forms had been circulated to the courts in August 2005 and posted on the rules web site for public comment. The advisory committee considered the public comments and made a few essential changes in the interim rules and the forms at its September 2006 meeting. He added that every district had adopted the interim rules without change or with very minor changes.

Professor Morris said that the advisory committee will meet next in March 2006, and it plans to submit a package of permanent rule revisions for publication at the June 2006 meeting of the Standing Committee. The proposed national rules will build on the interim rules and include a number of other provisions not included in the interim rules and some amendments unrelated to the bankruptcy legislation.

Professor Morris reported that the advisory committee had also conducted a cover-to-cover study of the restyled civil rules at the request of the Advisory Committee on Civil Rules. He explained that the civil rules apply generally in adversary proceedings, and they may be applied in contested matters. In addition, some bankruptcy rules are modeled on counterpart provisions in the civil rules. He noted that the advisory committee had broken into six groups, each of which carefully reviewed an assigned block of rules, checked for any possible impact on the bankruptcy rules, and examined whether any changes were needed in language or cross-references. At the end of this detailed study, he said, the advisory committee found very few problems with the restyled civil rules, and it communicated its observations to the Advisory Committee on Civil Rules.

Judge Zilly added that the individual members of the advisory committee had spent an enormous amount of time studying the new bankruptcy legislation and drafting the interim rules. In addition, they devoted an enormous amount of time to revising the official bankruptcy forms and devising new forms to implement the new procedural requirements of the legislation. He noted that the official forms took effect on October 17, 2005, following approval by the Executive Committee of the Judicial Conference.

Historical Perspective

At the request of Judge Levi, Professor Resnick gave the committee a historical perspective on the bankruptcy system and the Federal Rules of Bankruptcy Procedure.

He explained that the Constitution gives Congress authority to establish uniform laws on the subject of bankruptcy and to make bankruptcy exclusively federal. The first meaningful national bankruptcy law, he said, was enacted in 1898, and it lasted until 1978. The 1898 Bankruptcy Act was amended substantially in the 1930s. Enactment of Chapter 11 in 1938 marked a major move away from liquidation and towards saving businesses.

By the late 1960s, several bankruptcy experts thought that it was time to conduct a complete review of the bankruptcy system. So Congress passed a law in 1968 creating a national bankruptcy commission, comprised of members of Congress, law professors, judges, and lawyers. The commission filed a report in 1973 that recommended replacing the 1898 Act with a new substantive bankruptcy law and a revised bankruptcy court structure. From 1973 to 1978, a great deal of debate ensued over the commission's recommendations, both in Congress and in the bankruptcy community, and in 1978 Congress enacted a new Bankruptcy Code and a new Article I court structure.

New procedural rules were needed to implement the 1978 Code. But there was not sufficient time to promulgate rules under the regular Rules Enabling Act process before the provisions of the 1978 Code took effect on October 1, 1979. Therefore, the Advisory Committee on Bankruptcy Rules drafted a set of "suggested interim rules" over a period of nine months. They were circulated to the courts in October 1979, with the notation that they had not been approved either by the Standing Committee or the Judicial Conference. They were generally adopted by the courts as local rules. The advisory committee then began work on drafting the new Federal Rules of Bankruptcy Procedure, which eventually took effect in 1983.

In 1982, the Supreme Court declared the jurisdictional provisions of the 1978 law unconstitutional in *Northern Pipeline Co. v. Marathon Pipeline Co.,* 458 U.S. 50 (1982). In 1984, new legislation was enacted that cured the jurisdictional defects and created the current bankruptcy court system under which bankruptcy jurisdiction is vested in the district courts and then delegated to the bankruptcy judges. The new court structure was reflected in a package of rule amendments that took effect in 1987. In 1986, the pilot U.S. trustee program – which took over the estate administration responsibilities in bankruptcy cases – was made a nationwide system. The advisory committee drafted rule amendments to implement the U.S. trustee system, and they took effect in 1991.

In the early 1990s, credit and lending groups complained that the pendulum in bankruptcy had swung too far toward protecting debtors at the expense of creditors, and

they initiated efforts to change the Bankruptcy Code. In 1994, Congress created another national bankruptcy review commission, which issued a comprehensive report in 1997. But the credit community was not satisfied with the recommendations, and their efforts led to the introduction of legislation in 1997 that would amend the Code substantially to better protect creditors' rights. The legislation was pending in each Congress from 1997 until April 2005, when it was enacted as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

At first, the Advisory Committee on Bankruptcy Rules did not move to draft potential rule changes to implement the pending legislation because its future was uncertain. In fact, the bill was vetoed by President Clinton. But with the election of President Bush in 2000, it appeared very likely that it would be enacted soon. So, the advisory committee, under the leadership of Judge Small, retained two additional bankruptcy law professors as consultants and began to study the legislation in depth to determine what changes would be needed in the bankruptcy rules and forms. By 2002, the committee had developed rough drafts of rules amendments.

The legislation was eventually enacted in April 2005, and it contained a general effective date of October 17, 2005. Fortunately, the six-month grace period gave the judiciary and the Department of Justice time to accomplish the many tasks required of them. The advisory committee, through concentrated efforts and starting from the 2002 drafts, was able to complete an emergency package of interim rules and revised official forms.

Professor Resnick said that the legislation was very controversial and had been opposed by the National Bankruptcy Conference, a committee of the American Bar Association, and virtually all bankruptcy judges and academics. But it was strongly supported by the credit card companies, banks, landlords, and certain other special interest groups.

In consumer cases, the legislation imposes additional restrictions on debtors, particularly Chapter 7 debtors. Among other things, they must undergo credit counseling and debtor education, and they must submit to a means test to determine whether they are presumed to be abusing the bankruptcy system. The test examines the debtor's monthly income, expenses, and discretionary income. Consumer bankruptcy lawyers, moreover, must meet new requirements and are exposed to additional liability that may lead them to raise their fees or go out of the consumer bankruptcy business.

For Chapter 11 business cases, a court's ability to extend the debtor's exclusive period to file a plan has been limited. The new law, moreover, generally makes it harder for small businesses to reorganize. It also gives landlords additional authority regarding leases.

Professor Resnick said that the legislation also contains some very good provisions, such as the new Chapter 15, dealing with cross-border insolvencies, and provisions dealing with health care, nursing homes, and patient rights. It also allows direct appeals from the bankruptcy court to the court of appeals in appropriate circumstances.

Professor Resnick pointed out that there are many technical flaws and ambiguities in the 500-page legislation, largely because it was drafted by special interest groups and lobbyists, and Congress was reluctant to make any changes. Moreover, he said that he thought it unlikely that Congress would enact technical amendments to correct the flaws in the near future.

He reported that the day after the legislation was signed, on April 21, 2005, the Advisory Committee on Bankruptcy Rules held a meeting of its subcommittee chairs and committee staff to decide on organizing its work. The committee decided at the outset that it should not wait the full three years it normally takes to complete the rules process. Rather, it had to produce forms and interim rules before the October 17, 2005 effective date of the legislation.

In Professor Resnick's view, there were three reasons for the advisory committee to act expeditiously. First, many of the existing national rules were now inconsistent with the statute. Second, rules and forms were needed quickly to implement the various new concepts and procedures contained in the law, such as the means test and Chapter 15 cross-border insolvency. Third, the new law explicitly directed the Judicial Conference to promulgate several new rules and forms.

Professor Resnick noted that the format of the interim rules drafted by the advisory committee differs from interim rules issued in the past. The committee, he said, decided to create the interim rules as amendments to the existing national rules, striking through deleted provisions and underlining new provisions. The interim local rules, therefore, will become the advisory committee's first draft of the proposed permanent amendments to the national rules.

He pointed out that the advisory committee had encountered a number of difficult problems in drafting the rules and forms. First of all, addressing some of the provisions in the legislation required a great deal of technical and specialized expertise in several different areas. Moreover, the advisory committee did not have time to benefit from public comment. It adopted a subcommittee system, with six different subcommittees addressing different aspects of the legislation – consumer provisions, business provisions, cross-border insolvency, health care, appeals, and forms. Professor Resnick praised Judge Zilly as a truly amazing chair, delegating work to the subcommittees, but also serving as an active participant in the work of every subcommittee.

After the advisory committee had completed and published the interim rules and forms on the Internet in August 2005, it received a number of helpful public comments pointing out a few technical errors. The advisory committee quickly made the corrections at its September 2005 meeting.

Professor Resnick pointed out that the advisory committee had drafted interim rules only in those areas where it was important to have a rule in place by October 17, 2005, such as where the new statute conflicted with an existing national rule. The advisory committee, he said, had involved the U.S. trustee organization in all its deliberations and activities, and it received a good deal of help and advice from the U.S. trustees.

The advisory committee also tried to make the rules and forms as neutral as it could on substantive issues. For the most part, it tried to leave the resolution of ambiguities in the legislation up to the courts. But in several instances it had to resolve ambiguities in order to devise the rules and forms. Most importantly, he said, in his opinion, every member of the advisory committee left behind any personal views or opposition to the legislation, and everybody worked hard to implement the law faithfully. The advisory committee, moreover, tried to be as transparent as possible, posting its work product on the Internet. The entire staff of the Administrative Office was outstanding, and particular appreciation is due to Patricia Ketchum, who was the centerpiece of the committee's efforts to redraft the bankruptcy official forms.

Professor Resnick said that he believes that it is very unlikely that the advisory committee will consider making any additional changes in the interim rules. Instead, it will concentrate on drafting the permanent amendments to the national rules. In the process, it will look at the actual experiences of the courts in using the interim rules, review all the public comments, and add some additional rules and forms at its March 2006 meeting.

In conclusion, Professor Resnick said that the advisory committee should approve a complete set of amendments to the national rules and official forms at its March 2006 meeting and publish them for public comment in August 2006. The revisions, therefore, will be on track under the regular Rules Enabling Act process, and the revised national rules would become effective on December 1, 2008.

Mr. McCabe added that the Act also contains a number of provisions that adversely impact the finances of the federal judiciary. For example, it allows debtors to petition for filing in forma pauperis. If the petition is granted, the judiciary loses its designated portion of the filing fee, which is used to fund basic court operations. Moreover, if the debtor does not pay a filing fee, there is no statutory authority in a chapter 7 case to pay the case trustee the $60 fee that funds the trustee's work. In addition, the Act imposes substantial additional work and costs on the courts. Among other things, the Administrative Office is required to compile and report substantial new

statistics in areas that are of no direct concern to the business needs of the judiciary. The Act's requirements have required the Administrative Office to expedite development of a multi-million dollar new statistical infrastructure capable of receiving and processing the new statistics.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachment of December 15, 2005 (Agenda Item 7).

Amendment for Publication

FED. R. CIV. P. 8(c)

Judge Rosenthal reported that the advisory committee had only one action item to present. She explained that FED. R. CIV. P. 8(c) (pleading affirmative defenses) lists "discharge in bankruptcy" as one of the affirmative defenses that a party must plead. She said that bankruptcy judges had suggested to the advisory committee that the rule is incorrect because § 524 of the Bankruptcy Code specifies that a discharge voids any judgment obtained on the discharged debt. It also operates as an injunction against a creditor bringing any action to collect the debt. Therefore, a discharge is not an affirmative defense as a matter of substantive bankruptcy law.

Judge Rosenthal said that the advisory committee was seeking authority to publish a proposed amendment to eliminate "discharge in bankruptcy" from the list of affirmative defenses in Rule 8(c). She added, however, that the advisory committee did not plan to publish the amendment immediately, but would hold it for publication as part of a package of amendments at a later date.

The committee without objection approved the proposed amendment for publication at a later date by voice vote.

Informational Items

Style Project

Professor Cooper provided a status report on the work of the advisory committee in restyling the body of civil rules. He noted that the project to restyle all the federal rules of procedure had been initiated in the early 1990's by Judge Robert Keeton and Professor Charles Alan Wright. Their goal was to rewrite the rules to achieve greater clarity and ease of use without changing meaning or substance. In addition, they sought

to eliminate inconsistencies and to use language consistently throughout the federal rules of procedure.

Professor Cooper pointed out that the Federal Rules of Appellate Procedure had been the first body of rules to be restyled. They were followed by the restyled Federal Rules of Criminal Procedure. Now, the Advisory Committee on Civil Rules had completed a style revision of all the Federal Rules of Civil Procedure, which it published for comment in February 2005. Professor Cooper noted that the advisory committee had received 21 written comments to date and had held one hearing in Chicago. The hearing, he said, was essentially a comprehensive round table discussion on the restyled rules with Gregory P. Joseph and Professor Stephen B. Burbank, who represented the views of a group of 21 distinguished lawyers and professors who had read the restyled rules carefully and provided detailed written comments to assist the advisory committee.

Professor Cooper noted that a majority of the reviewing group had expressed the view that the project to restyle the civil rules should not proceed further because it could introduce inadvertent changes in the meaning of rules and possibly lead to litigation and added transactional costs. It might also preclude a more comprehensive overhaul of the civil rules. He also reported that members of the reviewing group had expressed concern that if the entire body of civil rules were re-adopted as a package, the supersession clause of the Rules Enabling Act process might cause mischief by overturning statutory provisions. Professor Cooper responded, though, that the advisory committee was considering a number of options for dealing with this problem.

Judge Rosenthal added that there had been no supersession problems when the restyled criminal rules were promulgated. Professor Cooper agreed that the fears expressed at the time about the criminal and appellate rules had not been realized in practice. He noted, for example, that the Department of Justice had reported that lawyers in its various divisions had not experienced any problems with the other restyled rules. Three of the law professors at the meeting added that they regularly read all the reported decisions in their fields and have not seen a single problem to date with the restyled rules.

Judge Rosenthal said that much of the public commentary on the restyled rules had been very positive, adding that the new rules are much clearer, easier to understand, and easier to use. She said that the advisory committee had been extraordinarily disciplined in its work and had avoided making any changes in language where there could be a potential change in meaning. She also thanked the Litigation Section of the American Bar Association for its help in supporting the project and providing very helpful input.

Other Amendments Under Consideration

Judge Rosenthal reported that the advisory committee had been so occupied with the restyling and electronic discovery projects that it had put aside a number of other issues. She listed several future committee agenda items, including:

(1) Rule 15 (amended and supplemental pleadings) – whether to consider changes in the automatic right of a party to amend its pleading or in the provision allowing relation back of an amendment changing the party against whom a claim is asserted, if the plaintiff files a case without knowing the name of the defendant but later discovers the name;

(2) Rule 26(a)(2)(B) (pretrial disclosure of expert testimony) – whether reports should have to be filed by employees who only sporadically give expert testimony;

(3) Rule 30(b)(6) (deposition of organization) – whether to address a number of problems and possible misuses of the rule in taking depositions of persons designated to testify for an organization named as a deponent;

(4) Rule 48 (number of jurors and participation in the verdict) – whether the rule should be amended to include a provision on polling the jury as found in FED. R. CRIM. P. 31;

(5) Rule 58(c)(2) (entry of judgment in a cost or fee award) – together with Rule 54(d)(2) (motion for attorneys' fees) and FED. R. APP. P. 4 (timing of a notice of appeal) – whether to examine the practical effect of the provisions that give a district judge discretion to suspend the time to file an appeal when a motion is filed for attorney fees;

(6) Rule 60 (relief from judgment or order) — whether the rule should be amended, or a new rule drafted, to authorize a district court to make "indicative rulings" on a post-trial motion when a pending appeal has deprived it of jurisdiction to grant the motion; and

(7) Rule 56 (summary judgment) – whether the rule should be rewritten to provide time limits, specify standards for granting summary judgment, and cure the disconnect between the text of the rule and the way that summary judgment motions are actually litigated in the courts.

Finally, Judge Rosenthal said that the advisory committee has also had on its agenda for a long time a controversial suggestion to reexamine notice pleading in the civil rules. She said that a number of courts are tempted to impose heightened pleading

requirements, and the interplay between the pleading rule and the discovery rules had arisen several times during the advisory committee's deliberations on the discovery rules. She added that if the advisory committee decides to change Rule 56, the pleading rule will necessarily be implicated.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Earlier in the morning, before the meeting began, Judge Bucklew presided over a hearing to listen to the testimony of Federal Public Defender Jon M. Sands, on behalf of the Federal Defenders Sentencing Guidelines Committee, regarding the advisory committee's proposed amendments to FED. R. CRIM. P. 11 (pleas), 32 (sentencing and judgment), and 35 (correcting or reducing a sentence), published in August 2005. The proposed amendments would conform the criminal rules with *United States v. Booker*, 543 U.S. 220 (2005).

Following the committee's lunch break, Judge Bucklew presided over a hearing of the testimony of Mike Sankey, on behalf of the National Association of Professional Background Screeners, regarding proposed new FED. R. CRIM. P. 49.1 (privacy protection for filings made with the court), published for public comment in August 2005.

Judge Bucklew and Professor Beale then presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of December 8, 2005 (Agenda Item 8).

Judge Bucklew reported that the advisory committee had spent most of its October 2005 meeting on three issues: (1) rule amendments to implement the Crime Victims' Rights Act (part of the Justice for All Act of 2004); (2) a proposed amendment to FED. R. CRIM. P. 29 (judgment of acquittal); and (3) a proposed amendment to FED. R. CRIM. P. 16 requiring the disclosure of *Brady* information before trial.

Amendments for Publication

Judge Bucklew said that the advisory committee was seeking authority from the Standing Committee to publish amendments to the Federal Rules of Criminal Procedure to implement the Crime Victims' Rights Act. The amendments consist of one new rule and changes to five existing rules. She added that the advisory committee had incorporated Judge Levi's suggested improvements in the text of the rules and committee notes.

FED. R. CRIM. P. 1

Judge Bucklew explained that the proposed amendment to Rule 1 (scope and definitions) would merely incorporate the statutory definition of a "crime victim" set forth in the Crime Victims' Rights Act. She added that the statutory definition was quoted in full in the proposed committee note.

FED. R. CRIM. P. 12.1

Judge Bucklew said that the proposed amendment to Rule 12.1 (notice of alibi defense) would provide that a victim's address and telephone number not be given automatically to the defendant if an alibi defense is made. The amendment would give the court discretion to order disclosure of the information or to fashion an alternative procedure giving the defendant the information necessary to prepare a defense, but also protecting the victim's interests.

Two members questioned the language of proposed new subparagraph (b)(1)(B) that places the burden on the defendant to establish a need for the victim's address and telephone number. They said that the presumption should be reversed. Thus, the rule would provide that the defendant has the right to speak with the victim, and the government would have the burden of showing that there is a need to protect the victim's interests. One participant suggested that the advisory committee might consider drafting alternate versions of the provision and including both in the publication of the rules. Another suggested that the matter might simply be highlighted in the covering letter accompanying the publication.

FED. R. CRIM. P. 17

Judge Bucklew said that the proposed amendment to Rule 17 (subpoena) would require court approval to obtain a subpoena served on a third party that calls for personal or confidential information about a victim. The court could also require that the victim be given notice of the subpoena and an opportunity to move to quash or modify it.

FED. R. CRIM. P. 18

Judge Bucklew explained that the proposed amendment to Rule 18 (place of prosecution and trial) would require the court to consider the convenience of any victim in setting the place of trial.

FED. R. CRIM. P. 32

Judge Bucklew pointed out that the proposed amendments to Rule 32 (sentencing and judgment) would delete the current definition in the rule of a victim of a crime of

violence or sexual abuse. The new, broader definition of a "crime victim," taken from the Crime Victims' Rights Act itself and incorporated in FED. R. CRIM. P. 1 (definitions), includes all federal crimes. The amended rule would also eliminate the current restriction that only victims of a crime of violence or sexual abuse are entitled to be heard at sentencing. The other proposed changes in the rule, she said, were relatively minor.

FED. R. CRIM. P. 43.1

Judge Bucklew explained that Rule 43.1 (victim's rights) was a completely new rule. She said that the advisory committee had debated whether to incorporate the changes implementing the Crime Victims' Rights Act into a single new rule or spread them throughout the rules. She said that the committee consensus was to place the principal changes in one rule.

Judge Bucklew said that subdivision (a) of the new rule deals with the right of a victim to receive notice of every public court proceeding, to attend the proceeding, and to be reasonably heard at certain proceedings. She noted that the government has the burden of using its best efforts to provide victims with reasonable, accurate, and timely notice of every court proceeding. Professor Beale added that paragraph (a)(3) uses the term "district court," rather than "court," to make sure that the rule does not provide a right to be heard in the court of appeals. This limitation tracks the language of the statute.

Some participants questioned whether all the provisions set forth in the proposed new rule are actually needed because most of them are specified in the Crime Victims' Rights Act itself. One participant noted, moreover, that FED. R. EVID. 615 already allows a court to exclude witnesses so that they cannot hear the testimony of other witnesses. Judge Bucklew and Professor Beale responded that victims' groups have argued strongly that pertinent provisions of the Act should be highlighted and located in the key provisions of the rules used every day by the bench and bar. They added that the advisory committee did not go beyond the substance of the statute itself in any way, but the committee was convinced that it was necessary to include some of the key victims' statutory provisions in the rules themselves.

One participant noted that the rules committees generally avoid repeating statutory language in the rules. Another added that the Standing Committee in its local rules project had discouraged the courts from repeating statutes in local rules because it can create style problems and lead to legal conflicts.

One member suggested that the new rule should not be numbered as Rule 43.1 because the preceding rule, FED. R. CRIM. P. 43, deals only with the presence of the defendant. He recommended that one of the open rule numbers, taken from abrogated

rules, should be used. It was the consensus of the committee that an abrogated rule number should be used or the new rule placed at the end of the rules.

One member questioned the meaning of proposed subdivision (b), which states that the court must decide promptly "any motion asserting a victim's rights." Judge Bucklew explained that the main purpose of the amendment was to emphasize the need for the court to act promptly. Professor Beale added that the statute covers the matter and uses the word "forthwith." She said that the rule may not strictly be necessary, but it is politically important. Another member suggested that the rule should be limited to motions asserting a victim's rights "under these rules." The committee consensus was to include the additional language.

Judge Bucklew reported that paragraph (b)(1) states that the rights of a victim may be asserted either by the victim or the government. One member suggested that paragraphs (1) through (4) do not fit well under subdivision (b), but should become new subdivisions (c) through (f). Judge Levi recommended that the advisory committee consider whether renumbering of the provisions would be appropriate.

The participants suggested a number of other potential improvements in language and organization of the rule for the advisory committee to consider.

The committee without objection approved the proposed amendments and new rule, including the changes suggested by the members, for publication by voice vote.

Informational Items

Judge Bucklew reported that the Standing Committee had returned the proposed amendments to Rule 29 (judgment of acquittal) to the advisory committee for further consideration. She said that drafting the rule had been more difficult than anticipated. A subcommittee had been working on it, and the advisory committee expected to present a draft rule to the Standing Committee for action at its June 2006 meeting.

As revised, Rule 29 would allow a judge to deny a motion for acquittal before the jury returns a verdict, or to reserve decision on the motion until after a verdict. But if the judge decides to *grant* the motion of acquittal, the judge would have to wait until after the jury returns a verdict – unless the defendant waives double jeopardy rights. The proposed rule sets forth what the judge must tell the defendant in open court, and it addresses the substance of the defendant's waiver.

One member opposed the rule and said that the Standing Committee had not returned the rule to the advisory committee with an implied endorsement. Judge Bucklew responded that the instruction to the advisory committee was to produce the

best possible rule. Judge Levi added that when a final draft is presented to the Standing Committee in June 2006, the advisory committee should make it clear whether or not it endorses the rule as a matter of policy.

Judge Bucklew described the proposed amendments to FED. R. CRIM. P. 16 (discovery and inspection), which would require the government to turn over exculpatory evidence to the defendant 14 days before trial. She said that the advisory committee did not have actual rule language yet, but it had taken a straw vote, and a majority of the members favored continuing work on a rule. She noted, though, that the Department of Justice was firmly opposed to the rule.

Professor Beale added that the proposal submitted by the American College of Trial Lawyers would go beyond the Supreme Court's substantive requirements in *Brady v. Maryland* and related cases. It would also specify the procedures for the government to follow in turning over specified types of information to the defendant before trial.

One participant emphasized that the rule would be very controversial, and he said that it would be essential for the advisory committee to prepare a complete background memorandum on the applicable law if it decides to present a rule to the Standing Committee. Judge Bucklew added that the advisory committee had also discussed the desirability of the Department of Justice making appropriate revisions to the U.S. attorneys' manual.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of December 1, 2005 (Agenda Item 9).

Judge Smith reported that the advisory committee had no action items to present.

Informational Items

Judge Smith noted that the advisory committee had continued its work on a rule governing waiver of privileges for submission to Congress. He said that the advisory committee was considering holding a special meeting or conference to complete work on a rule that could be submitted to the Standing Committee in June 2006.

Judge Smith reported that the advisory committee was continuing to monitor case law developments following the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), which limits the admission of "testimonial" hearsay. He said that because of the uncertainty raised by *Crawford,* the advisory committee would not move

forward with any rule amendments dealing with hearsay. Judge Smith also reported that the advisory committee was considering a possible amendment governing evidence presented in electronic form.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Schiltz presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of December 9, 2005 (Agenda Item 10).

Judge Kravitz pointed out that the subcommittee included several practicing lawyers, and it was blessed with having Professor Schiltz as its reporter. He reported that the subcommittee's work had begun with a memorandum drafted by Professor Schiltz that outlined all the potential time-computation issues in the federal rules. The memorandum, he said, had been circulated to the committee reporters for comment and then considered at a subcommittee meeting in October 2005.

Judge Kravitz explained that the subcommittee was focusing at the moment on how time should be computed, rather than on the specific time limits scattered throughout the rules. The latter, he said, would be addressed later by the respective advisory committees.

Judge Kravitz noted that the subcommittee had decided preliminarily to propose a number of changes in how time is computed, the most significant of which would be to eliminate the "10-day rule," set forth in FED. R. CIV. P. 6(e) and counterpart provisions in the appellate, bankruptcy, and criminal rules. The existing rules, he explained, specify two different ways of counting time. If a time period specified in a civil, criminal, or appellate rule is 10 days or less, intervening weekends and holidays are excluded in the computation. But if a time period set forth in a rule is 11 days or more, weekends and holidays are in fact counted. (For bankruptcy rules, the dividing line is 8 days, rather than 11.) Judge Kravitz said that by abolishing the "10-day rule," all days would then be counted in the future. And if the last day of a prescribed period is a weekend or holiday, the deadline would roll over to the next weekday.

Professor Schiltz said that in drafting a proposed model rule, the subcommittee had decided against simply eliminating the "10-day" language in the current rule. That approach, he said, might be too subtle and could be missed by lawyers. Instead, the proposed rule attracts attention to the change and tells the bar affirmatively to count every day or hour.

Judge Kravitz said that after the subcommittee makes its final recommendations, the individual advisory committees will take a hard look at the impact on each of the specific deadlines in their rules. For example, 10-day deadlines in the current rules

would necessarily be shortened because the parties will no longer get the benefit of excluding weekends. The advisory committees, thus, might wish to increase some 10-day deadlines to 14 days.

He added that the time-computation subcommittee was comprised largely of members of the advisory committees. The members, he said, would be expected to go back to their respective advisory committees and take a leading role in examining and adjusting the deadlines. Judge Kravitz added that the subcommittee's recommendations would be completed by early 2006, circulated to the advisory committees for comment, and considered by the Standing Committee in June 2006. After reviewing all the comments, the subcommittee would send its recommendations to the advisory committees and ask them to proceed with making any needed changes in their deadlines.

Judge Kravitz reported that the subcommittee had also considered amending the time-computation rules to take account of electronic filing and service. Anticipating that electronic filing and service will become virtually universal in the future, the subcommittee discussed eliminating the provision that gives a party three additional days to act after being served by mail, electronically, or by leaving papers with the clerk's office. He pointed out that the practicing attorneys on the subcommittee were strongly of the view that as long as mail remains a service option, the three additional days must be retained. But, he said, even though the additional three days had been provided to encourage the use of electronic service, that incentive is probably no longer needed. Judge Kravitz said that the subcommittee needs to address the three-day rule, and it would likely decide to retain the three-day rule for mail but eliminate it for other kinds of service.

In addition, Judge Kravitz said, the subcommittee had drafted a provision to calculate time periods stated in hours, rather than days. Professor Schiltz explained that the subcommittee had drafted a simple rule that would extend a deadline by 24 hours if the last day falls on a weekend or holiday.

Judge Kravitz said that the subcommittee had also addressed the issue of "backwards counting," such as in computing the deadline for a party to file a paper in advance of a hearing or other event. Professor Schiltz pointed out that the proposed draft states that when the last day is excluded, the computation "continues to run in the same direction," *i.e.*, backwards. Thus, if the final day of a backward-looking deadline falls on a Saturday, the paper would be due on the Friday before the Saturday, not on the Monday following the Saturday.

Judge Kravitz reported that the subcommittee also considered whether all time limits in the rules should be expressed in seven-day increments, but decided not to mandate such a rule. Rather, it would encourage the advisory committees to keep such a protocol in mind as they adjust deadlines in response to the subcommittee's new time-counting rule.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater presented the report of the Technology Subcommittee. He noted that proposed amendments to the rules had been published in August 2005 to implement section 205 of the E-Government Act of 2002. The legislation requires the Supreme Court to prescribe rules –

> "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically."

Judge Fitzwater reported that some comments had been received on the proposed rules, but there had been only one request to testify at a scheduled public hearing. He also noted that he had recently attended a conference at which some concern had been expressed regarding the viability of the two-tier access system contemplated in the proposed rules, under which certain sensitive records would be made available at the courthouse, but not on a court's web site.

One of the members pointed out that many of the provisions dealing with electronic filing are set forth in local court standing orders and general orders, rather than in local court rules. He suggested that it would be very helpful if the committee provided guidance to the courts and circuit councils as to what matters should be placed in local rules and what should be set forth in orders.

PANEL DISCUSSION ON THE LEGACY OF CHIEF JUSTICE REHNQUIST

Judge Levi explained that he had asked former committee member Charles Cooper and current committee member Judge Kravitz to put together a panel reflecting on the rich legacy of the late Chief Justice William H. Rehnquist and his contributions to the federal rulemaking process. He noted, though, that after putting the program together, Mr. Cooper was unable to attend because of a last-minute conflict. Judge Levi noted that both Judge Kravitz and Donald Ayer had been law clerks of the late Chief Justice, and James Duff had served as the chief justice's administrative assistant, *i.e.,* chief of staff, from 1996 to 2000.

Judge Kravitz explained that he would speak about the personal qualities that impressed him most about the late Chief Justice when he had served as his law clerk. Mr. Ayer, he said, would then discuss the Chief Justice's legacy on the important issue of federalism. Finally, he added, Mr. Duff would speak about the Chief Justice as the administrative leader of the Third Branch and his support of the rules program.

Judge Kravitz noted that Mr. Ayer has an active appellate practice in Washington and had served in the past as the principal deputy to the Solicitor General, as Deputy

Attorney General, and as the U.S. attorney for the Eastern District of California. Mr. Duff, he said, is the managing partner in the Baker Donelson law firm in Washington and also serves as the legislative counsel for the Federal Judges Association.

Judge Kravitz said that he had read many tributes to the late Chief Justice and saw a number of common themes reflected in them. The eulogists all recognized the same character traits in Chief Justice Rehnquist, namely: (1) how brilliant he was; (2) what a wonderful teacher he was; (3) how well he understood the Supreme Court as a decision-making body; and (4) how decent, modest, and normal he was for a person of such enormous stature and authority.

As for his brilliance, Judge Kravitz said, the Chief Justice's mind was encyclopedic and his memory prodigious. He had an amazing ability to memorize citations, and he knew details about every congressional district. He could cite poetry, Gilbert and Sullivan librettos, and literature by heart. He could also dictate completely polished opinions into a tape recorder without any editing.

He was a dedicated teacher who spent a great deal of time with his law clerks. He had regular conferences with his clerks, but he did not have them write bench memos. Rather, he would tend to go for a walk with the clerks on the Mall and talk to them about cases and upcoming issues and opinions. He saw it as a way of training the clerks to think on their feet, without notes. It was also his way of preparing for arguments.

As a training device, he would have the clerks write opinions on stays, even though not strictly needed. He told them that it was important for them to be able to write under pressure. He set very tough deadlines and had the clerks produce draft opinions within 10 days after argument. He also spent a great deal of time teaching the clerks about life and about family, and he was very interested in the clerks' plans for the future.

He was also a master of the politics of the Court and how the Court functioned as a decision-making body. He knew how to move the Court and how to marshal a majority of votes in a case.

Finally, Judge Kravitz added, William Rehnquist's most important quality was his basic decency. In some courts, he noted, disputes arise among the judges, and dissenters occasionally use uncivil language. But the Chief Justice was overwhelmingly civil and polite. He got along very well with his ideological opponents, and he knew that the best way to influence people was with kindness.

He deeply loved his family, and they were the most important thing in his life. His law clerks put on skits, and he was the butt of their jokes and loved it. In all, he had great common sense, pragmatism, and good judgment.

Mr. Ayer agreed with the observations of Judge Kravitz and said that the great successes of the Chief Justice had everything to do with who he was as a person. He was a phenomenon in melding all these great personal qualities, and he ended up being loved by all the members of the Court. Mr. Ayer emphasized that very few people in high places today possess the same qualities.

The Chief Justice, he said, was also a person with a vision and an indelible sense of what the Constitution is and should be. He had an agenda and knew where he wanted to go. Thus, over the course of 33 years on the Court, he moved the Court in his direction, particularly in cases involving religion, habeas corpus, federalism, and criminal procedure.

Mr. Ayer presented a scholarly review of the late Chief Justice's decisions regarding federalism – the area where he affected the law most profoundly. The Chief Justice's allegiance, Mr. Ayer said, was to the union intended by the founding fathers that balanced federal and state powers. He was an activist in trying to restore that balance of power and undo the expansions of federal power that began with the New Deal.

Mr. Ayer divided his detailed analysis of the federalism cases into three broad areas: (1) "commandeering," *i.e.,* where Congress orders the behavior of state employees; (2) narrowing the Commerce Clause power of the federal government; and (3) the 11th Amendment and sovereign immunity.

Mr. Duff concurred that William Rehnquist was an extraordinary man with a combination of great talents. His support of the rules process was no different from the approach he took with everything else. He was intimately familiar with all the agendas of the Judicial Conference committees, including items on the Conference's consent calendar. He invariably would ask penetrating questions about agenda items that went right to the heart of a matter.

In the late 1980s, before the Chief Justice streamlined the Judicial Conference's operating procedures, Conference sessions used to go on for several days, as each committee chair would read his or her report. Chief Justice Rehnquist, though, pushed most of the work from the Conference to its committees. He instituted the discussion and consent calendars, and he rotated the committee members and chairs. Nevertheless, he recognized that there is a need for greater continuity in the area of the federal rules, so he extended the terms of some rules committee chairs and members.

Mr. Duff said that the Chief Justice had an exacting sense of the separation of powers and the balance between the federal government and the states. He was also passionate about the independence of the judiciary. He recognized the important role of the rules committees, both in guiding Congress on procedural matters and in maintaining judicial independence.

Mr. Duff pointed to *Nixon v. United States,* involving the impeachment of a federal judge who had been convicted of perjury and imprisoned. Judge Nixon challenged the procedures chosen by the Senate in having a committee, rather than the full body, take the evidence at his impeachment trial. The opinion of the Supreme Court held that since the Constitution authorizes the Senate to conduct impeachment trials, the Senate can decide on its own procedures. He said that the decision was very important to the separation of powers and works ultimately to the benefit of the judiciary when it exercises its own powers. The rules committees, he said, need to exercise their authority over court procedures wisely and keep Congress from filling a vacuum with statutes.

Mr. Duff said that both sides of the aisle praised the Chief Justice for his leadership role in the impeachment trial of President Clinton. He pointed out that the chief justice and he had met with the Senate leadership to discuss trial procedure, and the exchanges had been very cordial. The chief justice had offered to conduct the trial as an ordinary trial, but the Senate had its own idea as to how the trial should be conducted. The Chief Justice, he said, was able to adapt very well to the Senate's rules.

In conclusion, Mr. Duff pointed out that in addition to his role as the leader of the Supreme Court, 84 different statutes give the chief justice administrative responsibilities.

Mr. Rabiej reported that the Chief Justice never announced his views regarding any rules proposal before the Judicial Conference. Nevertheless, he was able to affect the outcome of a proposal by shaping the procedure. For example, at its September 1999 session, the Conference had before it an important package of rules dealing with the scope of discovery and disclosure. Normally, only one rules committee chair would be allowed to speak. But with the 1999 package, the Chief Justice allowed both the chair of the Standing Committee and the chair of the civil advisory committee to address the Conference. He also decided who would speak first on an issue. Thus, he let both rules committee chairs speak first on the discovery rules package, before any opponent could speak. In addition, speakers normally would be given only five minutes to make a presentation, but the Chief Justice allowed the rules committee chairs a great deal more time. In the end, the 1999 rules package was approved by one vote.

Mr. Rabiej pointed out that several years ago, legislation had been introduced in Congress that would have required that a majority of the members of each rules committee be practicing lawyers. The Chief Justice, he said, made a number of phone calls, and the issue quickly died down. In addition, Mr. Rabiej said, the Chief Justice established the tradition of having the chair and the reporter of the Standing Committee meet annually with him to discuss the current and future business of the rules committees.

Judge Kravitz concluded the panel discussion by reading a letter from Judge Anthony Scirica, former chair of the Standing Committee, emphasizing how supportive

Chief Justice Rehnquist had been in rules matters and how he had been the best friend of the rules process.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, June 22-23, 2006, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary