COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 7-8, 2000
Washington, D.C.

Minutes

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Wednesday and Thursday, June 7-8, 2000. The following members were present for the entire meeting:

Judge Anthony J. Scirica, Chair
Judge Michael Boudin
Judge Frank W. Bullock, Jr.
Charles J. Cooper
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte
Acting Associate Attorney General Daniel Marcus
Patrick F. McCartan
Judge J. Garvan Murtha
Judge A. Wallace Tashima

Chief Justice E. Norman Veasey and David H. Bernick each attended one day of the meeting. Roger A. Pauley, Director (Legal) of the Office of Policy and Legislation, also participated on behalf of the Department of Justice. In addition, Judge James A. Parker, former member of the committee and chair of its style subcommittee, attended the entire meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mark D. Shapiro, deputy chief of that office; Patricia S. Ketchum, senior attorney in the Bankruptcy Judges Division; and Lynn Rzonca, assistant to Judge Scirica. Abel J. Mattos, Chief of the Court Administration Policy Staff of the Administrative Office, also participated in part of the meeting.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Member
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Judge Tommy E. Miller, a member of the Advisory Committee on Criminal Rules, assisted in the presentation of the report of that advisory committee.

Also taking part in the meeting were: Joseph F. Spaniol, Jr. and Professor R. Joseph Kimble, consultants to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Marie C. Leary of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica thanked Judge Parker for his distinguished service as a member of the committee and as the chair of the style subcommittee. He pointed out that substantial progress had been achieved in restyling and improving the language of the federal rules, thanks to the excellent work of the style committee and the respective advisory committees. He noted that the revised, restyled body of appellate rules had been very well received by the bench and bar and that a complete set of restyled criminal rules was about ready for publication and comment.

Judge Scirica reported that no proposed rule amendments had been before the Judicial Conference at its March 2000 meeting for approval. He added that the Supreme Court had promulgated the rule amendments approved by the Conference in September 1999 — including the proposed changes to the discovery rules — and had forwarded them to Congress in accordance with the Rules Enabling Act. These amendments, he said, would take effect on December 1, 2000, unless Congress were to take action to reject them. He noted, however, that one lawyers' association had raised some objections to the discovery rules and that hearings might be convened in Congress to consider the amendments.

Judge Scirica pointed out that the committee and the Judicial Conference have an affirmative statutory responsibility to monitor and improve the federal rules. Nevertheless, he said, some proposed amendments to the rules have been controversial and have encountered opposition from parts of the bench or bar. As a result, he suggested, the rules process has become more visible, more political, and more difficult.

Judge Scirica reported that he and Professor Coquillette had met with the Chief Justice to keep him informed of on-going initiatives of the rules committees. He said that it was also

time for him to meet with the chairs of the advisory committees to take a fresh look at the rulemaking process and the future directions of the committees.

Judge Scirica reported that a provision in the omnibus bankruptcy legislation pending in Congress would provide for appeals — including interlocutory appeals — to be taken from the orders of bankruptcy judges directly to the courts of appeals as a matter of course. This would effectively eliminate the district courts from the bankruptcy appellate process. This provision, he said, was in conflict with the Judicial Conference's position that direct appeals to the court of appeals should be authorized only through a certification process limited to matters that raise important legal issues or questions of public policy. Judge Scirica reported that the Executive Committee of the Conference had been informed of the legislative problem and that negotiations with the Congress would be pursued.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 6-7, 2000.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the committee's two-year pilot program to receive public comments on proposed rule amendments electronically through the Internet had been successful. He said that the AO and the advisory committees would like to make the experiment permanent. Thus, all published amendments will continue to be posted on the Internet at the same time that they are distributed to the public in printed form. The bench and bar will continue to be invited to submit comments to the Administrative Office via the Internet.

The committee without objection approved making the pilot program permanent and continuing to accept public comments on proposed amendments in electronic form through the Internet.

Mr. Rabiej reported that the American Bar Association in February 2000 had passed a resolution calling for posting all local rules of court on a single Internet site maintained by the federal judiciary. He noted that the issue had been assigned to the Judicial Conference's Court Administration and Case Management Committee. That committee, he said, would expect input from the rules committees on the proposal.

Mr. Rabiej pointed out that more than half the federal courts had posted their local rules on their own, individual Internet sites. In addition, the judiciary's national web site, maintained by the Administrative Office, contains links to the sites of the individual courts.

He emphasized that the Standing Committee and the respective advisory committees had long supported the concept of posting all local court rules on the Internet as an effective means of providing prompt, accurate, and complete procedural information to the bar and public.

Mr. Rabiej reported that the advisory committees had discussed the proposal on several occasions and had reached a consensus that:

1. Individual federal courts should be encouraged to post their local rules on their own web sites.

2. Those courts without a web site should be encouraged to develop one, even if only to post their local rules.

3. Courts should be encouraged to post their local rules in a prominent location on their web site so that a user may readily locate them, such as by establishing a special icon designated for local rules information.

4. Courts should be encouraged to include a uniform statement immediately below the caption of the local rules to indicate that they are current.

5. Local court web sites should be directly linked to the national judiciary site maintained by the Administrative Office.

The committee approved the proposed actions outlined in Mr. Rabiej's presentation and asked that they be communicated to the Court Administration and Case Management Committee.

Mr. Rabiej pointed out that implementation of these recommendations would be voluntary for the courts, and inevitably not every rule of every court will be posted immediately. Judge Garwood added that the Advisory Committee on Appellate Rules had discussed on a preliminary basis the possibility of making local court rules ineffective until they are actually placed on the Internet or otherwise posted as prescribed by the Director of the Administrative Office.

One of the participants added that FED. R. CIV. P. 83(a) already requires the courts to send their local rules to the Administrative Office and to make them available to the public. He added that the rule could be used to mandate that every court establish an electronic link with the Administrative Office and keep its local rules up to date on its own site.

Another participant said that it was important to have two dates posted on the local rules web site: (1) the date of the most recent amendment to a particular rule; and (2) the date of the last general revision of the court's local rules as a whole.

Ms. Leary referred the members to a description of the list of various pending Federal Judicial Center projects, set out as Agenda Item 4.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Garwood's memorandum and attachments of May 11, 2000. (Agenda Item 5)

Judge Scirica reported that the Standing Committee at its January 2000 meeting had approved for publication proposed amendments to FED. R. APP. P. 1, 4, 5, 15, 24, 26, 27, 28, 31, 32, 41, 44 and FORM 6. But, he added, proposed amendments to FED. R. APP. P. 4(a)(7), defining the entry of judgment, had been withdrawn for further consideration at the June 2000 meeting. The amendments, he said, involved complicated and troublesome interfaces between the appellate and civil rules that needed to be addressed through the joint efforts of both the appellate and civil advisory committees.

Amendments for Publication and Comment

1. Electronic Service

FED. R. APP. P. 25(c) & (d), 26(c), 36(b), 45(c)

Professor Schiltz reported that the package of amendments to the appellate rules governing electronic service were identical to the proposed companion amendments to the civil rules (and companion amendments to the bankruptcy rules), except in one respect. He explained that under the proposed amendments to both the appellate rules and the civil rules:

- service by electronic means would be permitted, but only on consent of the parties;
- the document that initiates a case, *i.e.*, the complaint or notice of appeal, would be excluded from the electronic service provisions;
- electronic service would be complete upon transmission;
- the "three-day" rule, giving the party being served an additional three days to act, would be made applicable to service by electronic means;
- the court itself could use electronic means to send its orders and judgments to parties; and
- the court could choose to provide electronic service for the parties through court facilities.

Professor Schiltz said that the only difference between the proposals related to the issue of failed transmission. He noted that the appellate and civil advisory committees both

agreed that if a serving party learns that its service is not effective, it must attempt to serve the appropriate document again. The appellate committee, however, was concerned about potential abuse of this provision. Therefore, it added a provision — not included in the proposed amendments to the civil rules — that would require a party being served to notify the serving party within three days after transmission that the paper was not in fact received.

Professor Cooper responded that the Advisory Committee on Civil Rules did not believe that the provision was needed. He added that there is a risk of unintended implication if the rules were to address failure of electronic service explicitly, but not failure of other types of service.

Professor Cooper was asked by the chair to describe the proposed amendments to the civil rules in further detail.

He reported that the electronic service proposal had been published in August 1999 and that some changes had been made in the amendments as a result of the public comments. He pointed out that the amended Rule 5(b)(1) makes it clear that electronic service will apply only to service under Rules 5(a) and 77(d), and not to the service that initiates a case.

Professor Cooper noted that new Rule 5(b)(2)(D) provides that electronic service — or service by means other than those specified in the current rule — must be consented to by the party being served. He added that the Department of Justice had commented that the rule should require that the consent be made in writing. Accordingly, the advisory committee had inserted new language in the amendment requiring explicitly that consent be made in writing. The committee note, though, makes it clear that the writing itself may be in electronic form.

Professor Cooper explained that the amendment specifies that service is complete on transmission. A party, moreover, may make service through the court's transmission facilities, as long as the court authorizes the practice by local rule.

Professor Cooper pointed out that paragraph 5(b)(3) had been added by the advisory committee following publication. It states that electronic service is not effective if the party making service learns that the attempted service failed to reach the person intended to be served.

He explained that the advisory committee had relied on the committee note to make the point that failed service is not effective service. Nevertheless, inclusion of an explicit statement in the text of the rule itself was prompted by consideration of the draft rule prepared by the Advisory Committee on Appellate Rules (FED. R. APP. P. 25(c)) and the desire to achieve uniformity in substance and language among the different sets of federal rules.

Professor Cooper explained that the draft paragraph 5(b)(3), as originally considered by the advisory committee, had not been limited to electronic service for fear that it might

generate unintended negative implications as to the status of failed service by other means. But, he said, after reviewing the case law on the subject and considering the narrower scope of the proposed appellate rule, the Advisory Committee on Civil Rules had decided to limit the scope of the paragraph to failure of service by electronic means.

He added, however, that the advisory committee did not believe that it was necessary to include a specific time limit for notifying the serving party of a failed transmission. Several participants agreed that failed service is simply not a problem in district court practice because parties always re-serve a paper that does not reach the party being served. Thus, no time limits need be specified in the rules. They argued that paragraph 5(b)(3) was not necessary because the problems resulting from failed transmissions can readily be resolved through the exercise of judicial discretion and the development of case law.

Judge Scirica noted that the proposed amendments to the civil rules governing electronic service — as well as the companion amendments to the bankruptcy rules had been subjected to the public comment process and were ready for final approval by the Judicial Conference. On the other hand, the proposed amendments to the appellate rules had been presented to the Standing Committee only for authority to publish.

Judge Scirica said that the provisions in the two sets of rules should be the same. He pointed out, however, that paragraph (b)(3) of the proposed amendments to FED. R. CIV. P. 5 — specifying that electronic service is ineffective if the serving party learns that it did not reach the person to be served — was new material added by the advisory committee after publication. As such, it would normally have to republished for additional public comment.

The committee reached a consensus that there should be only one, uniform version of the proposed electronic service rules and that the appellate version should be altered to conform to the proposed civil version.

The Committee approved the proposed amendments to FED. R. CIV. P. 5(b) without objection.

Judge Boudin moved to conform the appellate rules to the civil rules by deleting the reference to three days in proposed new Rule 25(c)(4) and approving the other proposed electronic service amendments for publication, i.e., FED. R. APP. P. 25(c), 25(d), 26(c), 36(b), and 45(c). The motion was approved without objection.

Judge Scirica added that the reporters of the civil and appellate advisory committees should consult further with each other to make sure that the language of the proposed amendments was essentially identical.

2. Financial Disclosure

FED. R. APP. P. 26.1

The proposed amendments to Rule 26.1 *(corporate disclosure statement)* were addressed as part of the general discussion on financial disclosure, addressed later in these minutes at pages 28-31

3. Other Amendments

FED. R. APP. P. 5(c) and 21(d)

Judge Garwood reported that the proposed amendments to Rule 5(c) *(appeal by permission)* and Rule 21(d) *(writs)* would correct an inaccurate cross-reference in the current rules to FED. R. APP. P. 32. In addition, the amendments would impose a new 20-page limit on petitions for permission to appeal and petitions for a writ of mandamus, prohibition, or other extraordinary relief.

FED. R. APP. P. 4(a)(7)

Professor Schiltz noted that the advisory committee had presented proposed amendments to Rule 4(a)(7) at the January 2000 meeting of the Standing Committee that would resolve case law splits among the circuits as to the finality of district court judgments and the time limit for filing a notice of appeal. He pointed out that members of the Standing Committee had expressed concerns about the amendments because, among other things, they would decouple the running of the time to file post-judgment motions (governed by the civil rules) from the running of the time to file appeals (governed by the appellate rules). Accordingly, the proposed amendments were deferred to the current meeting. In the interim, the advisory committee was asked to conduct further research into when judgments become effective for all purposes. It was also asked to work with the civil advisory committee and attempt to develop an integrated package of proposed amendments to the appellate rules and the civil rules.

Professor Schiltz reported that the two advisory committees had produced a set of proposed amendments that would resolve the concerns of the members. He said that FED. R. CIV. P. 58(b) would be amended to specify that when a judgment must be "set forth" on a separate document, it will be considered so entered when: (1) it is actually set forth on a separate piece of paper; or (2) 60 days after entry of the judgment on the civil docket, whichever is earlier. This provision, he said, would set a 60-day outer limit in determining the finality of a judgment for purposes of both a post-judgment motion and a notice of appeal. A companion amendment to FED. R. APP. P. 4(a)(7) would simply provide that a judgment is considered entered for purposes of the appellate rules when it is entered for purposes of the civil rules.

The proposed amendments would also clarify whether an order disposing of a post-judgment motion must itself be set forth on a separate piece of paper. FED. R. CIV. P. 58 would be amended to specify that orders that dispose of post-judgment motions do not have to be entered on a separate document. FED. R. APP. P. 4(a)(7), as revised, would simply refer to Civil Rule 58. Thus, the civil rules will govern, and there will be no separate appellate provision.

Judge Garwood and Professor Schiltz said that the proposed, companion amendments to FED. R. CIV. P. 58 and FED. R. APP. P. 4(a)(7) might not solve all the problems regarding the effectiveness of a judgment, but they would resolve the most serious and most frequent problems. They added that the public comment period would provide a good opportunity to discover any additional problems.

The committee approved the proposed amendments without objection.

Informational Items

Judge Garwood announced that Professor Schiltz would leave his position with the Notre Dame Law School to accept the position of associate dean of the newly established St. Thomas Law School in Minneapolis, Minnesota.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Morris presented the report of the advisory committee, as set forth in Judge Duplantier's memoranda and attachments of May 11, 2000, and May 24, 2000. (Agenda Item 6)

Judge Duplantier summarized that the advisory committee was seeking final approval of amendments to eight bankruptcy rules and one official form. He pointed out that four of the proposed amendments deal with providing adequate notice to parties affected by an injunction included in a chapter 11 plan, and two deal with giving notice to infants or incompetent persons. He noted that the public hearings scheduled for January 2000 in Washington had been canceled for lack of witnesses.

Judge Duplantier reported that the advisory committee was also seeking authority to publish proposed amendments to six rules and one official form for public comment.

Amendments for Final Approval

FED. R. BANKR. P. 1007(m)

Judge Duplantier explained that the proposed amendment to Rule 1007 *(lists, schedules, and statements)* would require a debtor who knows that a creditor is an infant or incompetent person to include in the list of creditors or schedules the name, address, and legal relationship of any representative upon whom process would be served in an adversary proceeding against the infant or incompetent person.

FED. R. BANKR. P. 2002(c) and (g)

Judge Duplantier reported that two amendments were proposed to Rule 2002 *(notices)*. New subdivision 2002(c)(3) would require that parties entitled to notice of a hearing on confirmation of a plan be given adequate notice of any injunction contained in the plan that would enjoin conduct not otherwise enjoined by operation of the Bankruptcy Code.

Subdivision 2002(g) would be revised to make it clear that when a creditor files both: (1) a proof of claim that includes a mailing address; and (2) a separate request designating a different mailing address, the last paper filed determines the proper address. In addition, a new paragraph (g)(3) would be added to assure that notices directed to an infant or incompetent person are mailed to the appropriate guardian or other legal representative identified in the debtor's schedules or list of creditors.

FED. R. BANKR. P. 3016(c)

Judge Duplantier said that a new subdivision (c) would be added to Rule 3016 *(filing of plans and disclosure statements)* to require that a plan and disclosure statement describe in specific and conspicuous language all acts to be enjoined by the provisions of a proposed injunction and to identify any entities that would be subject to the injunction.

FED. R. BANKR. P. 3017(f)

Judge Duplantier stated that a new subdivision (f) would be added to Rule 3017 *(court's consideration of a disclosure statement)* to assure that adequate notice of a proposed injunction contained in a plan is provided to entities whose conduct would be enjoined, but who would not normally receive copies of the plan and disclosure statement — or any information about the confirmation hearing — because they are not creditors or equity security holders in the case.

FED. R. BANKR. P. 3020(c)

Judge Duplantier said that subdivision (c) of Rule 3020 *(confirmation of a chapter 11 plan)* would be amended to require that the court's order confirming a plan describe in detail all acts enjoined by an injunction contained in a plan and identify the entities subject to the injunction. It would also require that notice of entry of the order of confirmation be mailed to all known entities subject to the injunction.

FED. R. BANKR. P. 9006(f)

The proposed amendment to Rule 9006 *(time)* is part of the package of proposed amendments authorizing service by electronic and other means in the federal courts. The companion amendments to FED. R. CIV. P. 5(b) were approved by the Standing Committee earlier in the meeting as part of the discussion of proposed amendments to the Federal Rules of Appellate Procedure. (See page 7 of these minutes.)

Judge Duplantier pointed out that Rule 9006(f), as amended, would explicitly authorize a party who is served by electronic means an additional three days to take any required action, just as if the party had been served by mail. Judge Duplantier added that the Advisory Committee on Bankruptcy Rules was very supportive of extending the "three-day rule" to all methods of service — including electronic service — other than service by personal delivery. He added, however, that the advisory committee was most concerned that the bankruptcy rules and the civil rules be uniform on this matter.

FED. R. BANKR. P. 9020

Judge Duplantier explained that the existing provisions of Rule 9020 *(contempt proceedings)* provide that the effectiveness of a bankruptcy judge's civil contempt order is: (1) delayed for 10 days; and (2) subject to *de novo* review by a district judge. The proposed amendment would delete the procedural provisions in the existing rule and replace them with a simple statement that a motion for an order of contempt made by the United States trustee or a party is governed by Rule 9014, which covers contested matters.

He pointed out that the amended rule does not address a contempt proceeding initiated *sua sponte* by a judge. The advisory committee, he said, noted that there is no provision in the civil rules dealing with contempt on a judge's own motion. It decided, therefore, not to include any provision in the bankruptcy rules on this point.

FED. R. BANKR. P. 9022(a)

Judge Duplantier stated that Rule 9022 *(notice of a judgment or order)* would be amended to authorize the clerk of court to serve notice of the entry of a bankruptcy judge's judgment or order by any method of service authorized by amended FED. R. CIV. P. 5(b),

including service by electronic means. He pointed out that the proposal — which mirrors the proposed amendment to FED. R. CIV. P. 77(d) — is part of the general package of amendments authorizing electronic service in the federal courts. (See the discussion above under FED. R. BANKR. P. 9006(f).)

OFFICIAL FORM 7

Judge Duplantier reported that the advisory committee would add four new questions to Official Form 7 *(statement of financial affairs)*, to solicit information from the debtor about community property, environmental hazards, tax consolidation groups, and contributions to employee pension funds. He pointed out that new Question 17, requiring information as to environmental hazards, represented a compromise because governmental agencies had wanted to require the debtor to disclose a good deal more information.

The committee approved the proposed amendments to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and Official Form 7 without objection.

Amendments for Publication and Comment

FED. R. BANKR. P. 1004

Judge Duplantier and Professor Morris explained that subdivision (c) of Rule 1004 *(partnership petition)* would be deleted because it is substantive in nature. The amendments would make it clear that the rule merely implements § 303(b)(3)(A) of the Bankruptcy Code. They are not intended to establish any substantive standard for the commencement of a voluntary case by a partnership. The amended rule will deal only with involuntary petitions against a partnership.

FED. R. BANKR. P. 1004.1

Professor Morris stated that the proposed new Rule 1004.1 would fill a gap in the existing rules and address the filing of a petition on behalf of an infant or an incompetent person. He noted that it is patterned after FED. R. CIV. P. 17(c) and allows a court to make any orders necessary to protect the infant or incompetent person.

FED. R. BANKR. P. 2004(c)

Judge Duplantier reported that subdivision (c) of Rule 2004 *(examination)* would be amended to clarify that an examination may take place outside the district in which the case is pending. An attorney who is admitted to practice in the district where the examination is to be held may issue and sign the subpoena.

FED. R. BANKR. P. 2014

Judge Duplantier said that Rule 2014 deals with approval of the employment of a professional and with disclosure of the information necessary to determine whether the professional is "disinterested" under the Bankruptcy Code. He pointed out that the rule was being rewritten to make it conform more closely to the applicable provisions of the Code.

Professor Morris added that the revised rule might be controversial because it deals with employment standards and prerequisites for the payment of professionals. The current rule, he said, requires disclosure of the professional's connections with a broad range of persons and organizations. The revised rule would narrow the scope of the disclosures and leave the definition of disinterestedness exclusively to the Code.

FED. R. BANKR. P. 2015(a)(5)

Judge Duplantier said that paragraph (a)(5) of Rule 2015 *(duty to keep records, make reports, and give notice of case)* would be amended to provide that the duty of a trustee or debtor in possession to file quarterly disbursement reports will continue only as long as there is an obligation to make quarterly payments to the United States trustee. Professor Morris added that the change was technical in nature since it would merely conform the rule to 28 U.S.C. § 1930(a)(6), which was amended in 1996.

FED. R. BANKR. P. 4004(c)

Judge Duplantier explained that subdivision (c) of Rule 4004 *(grant or denial of discharge)* would be amended to postpone the entry of a discharge if a motion to dismiss a case has been filed under § 707 of the Bankruptcy Code. The current rule, he said, is narrower, as only motions to dismiss brought under § 707(b) postpone a discharge.

FED. R. BANKR. P. 9014

Judge Duplantier reported that the advisory committee recommended two changes in Rule 9014 *(contested matters)* that would address complaints voiced by the bar about the way that contested matters are handled in some districts.

Judge Duplantier explained that the first proposed amendment, set forth as new subdivision (d), would govern the use of affidavits in disposing of contested matters. He said that a number of bankruptcy courts now routinely resolve contested matters on the basis of affidavits alone. He added that the practice was controversial, and there was a split of opinion as to its legality and advisability.

Judge Duplantier stated that the proposed amendment would provide that if the court needs to resolve a disputed material issue of fact in order to decide a contested matter, it must

hold an evidentiary hearing at which witnesses testify. It may not rely exclusively on affidavits in those circumstances. Contested matters, thus, would be handled in the same manner as adversary proceedings and trials in civil cases in the district courts under FED. R. CIV. P. 43.

The second amendment would address complaints from the bar that some courts schedule contested matters for a hearing without informing the parties in advance as to whether evidence will be taken from witnesses at the hearing. Lawyers, therefore, bring their witnesses to court, only to learn that live testimony will not be allowed. Judge Duplantier said that the proposed amendment would require the courts to establish procedures giving parties advance notice of whether a scheduled hearing will be an evidentiary hearing at which witnesses may testify.

FED. R. BANKR. P. 9027

Judge Duplantier said that Rule 9027(a)(3) *(notice of removal)* would be amended to make it clear that if a claim or cause of action is initiated in another court after a bankruptcy case has been commenced, the time limits for filing a notice to remove that claim or cause of action to the bankruptcy court apply, whether or not the bankruptcy case is still pending. In other words, he said, if a state court action is filed after a bankruptcy discharge has been granted, the action should be removable, whether or not the bankruptcy case is still pending.

OFFICIAL FORM 1

Judge Duplantier reported that the advisory committee recommended amending Official Form 1 (*Voluntary Petition)* to require that the debtor disclose the ownership or possession of property that may pose a threat of imminent and identifiable harm to public health or safety. He noted that the change may be controversial because it could be seen as calling for self-incrimination. But, he said, the advisory committee had drafted the language carefully to avoid the problem by requiring disclosure only of property that "to the best of the debtor's knowledge, poses or is alleged to pose" a threat to public health or safety.

Professor Morris pointed out that the petition form itself will require the debtor to check a box declaring whether there is any property posing an alleged harm. If so, the debtor must also attach new Exhibit C setting forth more detailed information about the alleged harm. This information, he said, would be filed by the debtor at the beginning of a case, so it would be flagged early for the attention of affected government agencies.

The committee approved the proposed amendments to Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, proposed new Rule 1004.1, and proposed amendments to Official Form 1 for publication and comment without objection.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal, acting for Judge Paul V. Niemeyer, the chair of the advisory committee, and Professor Cooper presented the report of the advisory committee, as set forth in Judge Niemeyer's memorandum and attachments of May 2000. (Agenda Item 7)

Rules for Final Approval

1. Electronic Service

FED. R. CIV. P. 5(b) and 6(e)

Professor Cooper pointed out that the proposed amendments to Rule 5(b) (*making service)* authorizing service by electronic means had been approved by the Standing Committee earlier in the meeting during its consideration of the report of the Advisory Committee on Appellate Rules. (See page 7 of these minutes.)

Professor Cooper explained that the advisory committee, in its August 1999 request for public comments, had *not* recommended that Rule 6(e) *(additional time after service)* be amended. The proposed amendment would extend the "three-day rule" to electronic service. Nevertheless, he said, the committee included it in its publication as an alternative proposal.

After reviewing the public comments and considering the proposed companion amendments to the bankruptcy rules, the advisory committee agreed unanimously to approve the proposed amendment to Rule 6(e). Thus, when service is made electronically — or by any means other than personal service — the party being served will be allowed an extra three days to act. He pointed out that electronic service is not in fact always instantaneous, and transmission problems may need some time to be straightened out. In addition, he said, inclusion of the three-day provision may encourage consents. Finally, he added, the advisory committee was convinced that the provisions of the civil rules should be consistent with those of the bankruptcy rules, which adopt the three-day rule.

The committee approved the proposed amendment to Rule 6(e) without objection.

FED. R. CIV. P. 77(d)

Professor Cooper noted that the proposed amendments to Rule 77(d) *(notice of orders or judgments)* reflect the changes proposed in Rule 5(b) and would authorize the clerk of court to serve notice of the entry of an order or judgment by electronic or other means.

The committee approved the proposed amendments without objection.

2. *Abrogation of the Copyright Rules*

Professor Cooper reported that the Advisory Committee recommended abrogation of the obsolete Copyright Rules of Practice under the 1909 Copyright Act. He noted that the advisory committee had urged elimination of these rules as long as 37 years ago.

FED. R. CIV. P. 65(f)

Professor Cooper pointed out that a new subdivision (f) would be added to Rule 65 *(injunctions)* to make the rule applicable to copyright impoundment proceedings.

FED. R. CIV. P. 81(a)

Professor Cooper said that Rule 81(a) *(proceedings to which the federal rules apply)* would be amended to eliminate its reference to copyright proceedings. In addition, the rule's obsolete reference to mental health proceedings in the District of Columbia would be eliminated, and its reference to incorporation of the civil rules into the Federal Rules of Bankruptcy Procedure would be restyled.

The committee approved abrogation of the copyright rules and the proposed amendments to Rules 65 and 81 without objection.

3. Technical Amendment

FED. R. CIV. P. 82

Professor Cooper reported that the proposed amendment to Rule 82 *(jurisdiction and venue not affected by the federal rules)* was purely a technical conforming change that could be made without publication. He said that the text of the current rule refers to 28 U.S.C. §§ 1391-1393. But Congress repealed § 1393 in 1988. Thus, the reference needed to be changed to 28 U.S.C. §§ 1391-1392.

The committee approved the proposed amendment without objection.

Amendments for Publication and Comment

1. Judgments

FED. R. CIV. P. 54(d) and 58

Judge Rosenthal noted that the Standing Committee had discussed the proposed amendments to Rules 54 *(judgments and costs)* and 58 *(entry of judgment)* earlier in the meeting as part of its consideration of the report of the Advisory Committee on Appellate

Rules and its approval of companion amendments to FED. R. APP. P. 4(a)(7). (See pages 8-9 of these minutes.)

She explained that Civil Rule 58(b) would be amended to provide that when the civil rules require that a judgment be set forth on a separate document, it will be deemed to have been entered for purposes of finality either: (1) when it is actually set forth on a separate document; or (2) when 60 days have run from entry on the civil docket, whichever is earlier.

Professor Cooper explained that under the rules a judgment is not effective until it is set forth on a separate document and entered on the civil docket. But, he said, in practice this requirement is ignored in many cases. Thus, failure to enter a final judgment on a separate document means that the time to file a post-judgment motion under the civil rules or a notice of appeal under the appellate rules never begins to run.

Professor Cooper added that the new Rule 58(b) is the central provision in the proposed amendments to integrate the civil and appellate rules. It would work in tandem with the proposed amendments to FED. R. APP. P. 4(a). As a result, a judgment would become final at the same time for purposes of both the civil and appellate rules.

Professor Cooper said that the proposed amendment to Rule 54(d) would delete the separate document requirement for an order disposing of a motion for attorney fees.

Professor Cooper suggested that the term "judgment," as used in the civil rules, is overly broad and may lead to a number of difficult theoretical problems. But, he said, the advisory committee had found no indication that the theoretical problems occur in practice. Thus, it saw no reason to reopen the definition of judgment in Rule 54(a). He added that the advisory committee had also decided not to reopen the separate document requirement of Rule 58.

The committee approved the proposed amendments for publication and comment without objection.

2. Financial Disclosure

The advisory committee's proposed new Rule 7.1 was discussed and approved by the Standing Committee later in the meeting as part of its consideration of proposed financial disclosure rule amendments. (See pages 28-31 of these minutes.)

3. Applicability of the Rules to Section 2254 and 2255 Cases and Proceedings

FED. R. CIV P. 81(a)

Professor Cooper reported that Rule 81(a)(2) *(applicability of the rules in general)* would be amended to make its time limits consistent with the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings.

The committee approved the proposed amendment for publication and comment without objection.

Information on Pending Projects

Judge Rosenthal referred briefly to several projects pending before the advisory committee and pointed out that they were described in greater detail at Tab 7B of the agenda materials.

She noted that the advisory committee's discovery subcommittee was continuing to explore a number of discovery issues, particularly those flowing from discovery of computer-based information. She said that the subcommittee had conducted a mini-conference with lawyers, judges, and forensic computer specialists to hear from them about the problems they have encountered with discovery of information in automated form. She added that the subcommittee had identified and discussed in a preliminary way several problems cited by practitioners. The central questions, she said, are: (1) whether the current federal rules are adequate to deal with the impact of the new technology; and (2) whether any of the problems identified are subject to rule-based solutions.

Judge Rosenthal reported that a subcommittee of the advisory committee was continuing to look at Rule 23 *(class actions)* to determine whether any additional changes in that rule might be appropriate. She pointed out that the committee had been examining Rule 23 since 1991. It had collected a great deal of empirical information and opinions from the bar, which have been published in extensive working papers. She noted that the committee's earlier proposals to amend Rule 23 had stirred substantial controversy, and it had not been possible to reach consensus on key issues. In addition, she said, the substantive law of class actions had been addressed recently by the Supreme Court.

Judge Rosenthal said that the subcommittee's initial sense was that further "substantive" changes are not called for in Rule 23. But it would continue to explore such discrete areas as attorney fees, procedures for approving settlements, the terms of settlements, and providing protection for absent class members.

Judge Rosenthal reported that a subcommittee had been appointed to study the use of special masters. She noted that the current Rule 53 focuses on special masters as fact finders,

but courts are using masters increasingly for various pretrial management and post-judgment purposes. She pointed out that the Federal Judicial Center had presented the advisory committee with an excellent empirical report on the use and practices of special masters in the district courts.

Finally, Judge Rosenthal reported that a subcommittee had been appointed to study the feasibility of creating an alternative set of simplified civil procedure rules that would be appropriate for some cases as a means of reducing costs and delay. The draft proposal would incorporate such features as early and firm trial dates, shorter discovery deadlines, reduced amounts of discovery, and curtailed motion practice.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis, Judge Miller, and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Davis's memorandum and attachments of May 8, 2000. (Agenda Item 8)

Amendments for Publication and Comment

Judge Davis reported that the advisory committee was seeking authority to publish three proposals for public comment:

1. a complete, restyled set of Criminal Rules 1-60, set forth in two separate packages;

2. proposed changes to the Rules Governing § 2254 Cases and § 2255 Proceedings; and

3. a new Criminal Rule 12.4, governing financial disclosure.

1. Comprehensive Review and Restyling of the Criminal Rules

Judge Davis said that the advisory committee had been working on restyling the entire body of Federal Rules of Criminal Procedure for more than a year. He noted, however, that several of the committee's proposed amendments had been under consideration before the restyling project began. And, as part of the restyling effort, the committee identified several amendments that might be considered substantive or controversial.

Therefore, he said, the advisory committee had decided to seek authority to publish the restyled body of rules in two separate packages. The first would consist of all the rules containing merely stylistic changes. The second would contain those rules in which the committee is proposing substantive changes, *i.e.*, Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41,

and 43. He added that these substantive changes had been deleted from the purely "style" package, and a reporter's note to the style package will explain that additional, substantive changes are being proposed and published simultaneously in a separate package.

Judge Davis noted that the revised Rules 1-31 had been approved for publication by the Standing Committee at its January 2000 meeting. He added that the advisory committee had considered the various suggestions made by members of the Standing Committee at that meeting, and it had incorporated them into a revised draft for publication. He proceeded to summarize the significant, non-style changes made by the advisory committee in Rules 1-31 following the January meeting.

Rules 1-31

FED. R. CRIM. P. 5

Judge Davis pointed out that the revised Rule 5 *(initial appearance)* would authorize an initial appearance to be conducted by video teleconferencing if the defendant waives the right to be present. He noted that the advisory committee would also publish an alternate version of the rule that would permit the court to conduct the appearance by video teleconferencing without the defendant's consent.

Judge Davis reported that the advisory committee had concluded that Rule 5 should be expanded to address all initial appearances. Thus, material currently located in Rule 40 *(commitment to another district)* would be moved to Rule 5. The revised rule also would provide explicitly that Rules 32.1 *(revoking or modifying probation or supervised release)* and Rule 40 *(commitment to another district)* apply when a defendant is arrested for violating the terms of probation or supervised release or for failing to appear in another district.

FED. R. CRIM. P. 10

Judge Davis reported that Rule 10 *(arraignment)* would be amended to allow video teleconferencing of arraignments upon the consent of the defendant. As with Rule 5, the advisory committee would also publish an alternate version of the rule permitting the court to conduct an arraignment by video teleconferencing without the defendant's consent.

FED. R. CRIM. P. 24

Judge Davis noted that the advisory committee had presented the Standing Committee in January 2000 with a proposed amendment to Rule 24 that would equalize the number of peremptory challenges at 10 per side. But, he said, the proposal would be controversial. Therefore, the advisory committee decided after further consideration to delete the proposed amendment from the restyling project and defer it for later consideration on the merits.

FED. R. CRIM. P. 26

Judge Davis reported that the proposed amendments to Rule 26 *(taking testimony)* would conform the rule in some respects to FED. R. CIV. P. 43. First, it would allow testimony from witnesses at remote locations. Second, it would delete the term "orally" from the current rule in order to accommodate witnesses who are unable to present oral testimony and may need a sign language interpreter.

Judge Davis noted that questions had been raised at the January 2000 meeting as to the possible impact of the amendments on FED. R. EVID. 804. He explained that the advisory committee had narrowed the proposed amendment to apply to those situations in which a witness is "unavailable" only within the meaning of paragraphs (4) and (5) of Evidence Rule 804(a).

Rules 32-60

Judge Davis reported that the advisory committee had considered proposed style revisions in Rules 32-60 at a special meeting in January 2000, at two subcommittee meetings, and at its regularly scheduled meeting in April 2000. He proceeded to discuss the rules that the advisory committee believed included one or more substantive changes or changes that warranted further elaboration.

FED. R. CRIM. P. 32

Judge Davis reported that Rule 32 *(Sentence and Judgment)* had been completely reorganized to make it easier to follow and apply. He pointed out that one proposed change in the rule may generate controversy. The current rule, he said, requires a court to rule on all unresolved objections to the presentence report. The revised rule would require the court to rule only on all unresolved objections to a "material" matter in the report.

Judge Davis noted that the Bureau of Prisons relies on the presentence report to make decisions about defendants in its custody. One member said that the current rule apparently requires judges to rule on matters that do not affect their sentence because the Bureau of Prisons may need the information for its own administrative purposes. During the discussion that ensued, various members offered the following points: (1) a court should not be burdened by having to decide matters not required for its sentencing decision because the Bureau of Prisons may need certain information; (2) defendants should not be penalized for non-essential information contained in the presentence report; (3) defense counsel have an obligation to ask the court to delete any objectionable information in the report; (4) the courts could ask probation officers to exercise greater discretion in keeping certain information out of the reports; and (5) the advisory committee could ask the Bureau of Prisons to reconsider some of its procedures.

Mr. Marcus said that the Bureau of Prisons needs and appreciates all the information it can obtain from the court. He pointed out that the Bureau has a difficult problem in obtaining relevant and accurate information from other sources, and it faces serious operational problems because of the volume of its caseload. He expressed concern about any effort that might restrict the Bureau from using any information that it currently receives from the court.

Judge Scirica recommended that the proposed rule be published for comment. He further suggested that the advisory committee take into account the various concerns expressed by the members and initiate discussions with the Bureau of Prisons. He said that the advisory committee should be prepared to address these matters when it returns to the Standing Committee for approval of the rule following publication.

Professor Schlueter reported that new paragraph (h)(5) would fill a gap in the current rules by requiring the court to give notice to the parties if it contemplates departing from the sentencing guidelines on grounds not identified either in the presentence report or in a submission by a party. He pointed out that this procedure is required by case law.

FED. R. CRIM. P. 32.1

Professor Schlueter said that Rule 32.1 *(revoking or modifying probation or supervised release)* had been completely restructured, but no significant changes had been made. He pointed out that language had been added that would govern an initial appearance when a person is arrested in a district that does not have jurisdiction to conduct a revocation proceeding.

FED. R. CRIM. P. 35

Judge Davis reported that Rule 35 *(correction or reduction of sentence)* would be amended to delete current subdivision (a), specifying district court action on remand, because it simply is not necessary.

Judge Davis said that subdivision (b) includes a substantive change that had been under consideration by the advisory committee before the restyling project. He pointed out that the amendment responds to the decision of the Eleventh Circuit in *United States v. Orozco,* 160 F. 3d 1309 (11th Cir. 1998), in which the court of appeals had urged an amendment to the current rule to address the unforseen situation in which a convicted defendant provides information to the government within one year of sentencing, but the information does not become useful to the government until more than a year has elapsed.

Concern was expressed by some of the members as to whether the proposed rule resolved all the issues raised by the *Orozco* case. Judge Davis and Professor Schlueter suggested that the revised rule be published for comment and that the advisory committee consider the implications of *Orozco* further during the comment period.

FED. R. CRIM. P. 40

Judge Davis pointed out that much of the substance of Rule 40 *(commitment to another district)* would be relocated to Rule 5.

FED. R. CRIM. P. 41

Judge Davis reported that the advisory committee would make significant changes in Rule 41 *(search and seizure)*. First, he said, the revised rule had been substantially reorganized. Second, it would explicitly authorize "covert entry warrants" allowing law enforcement agents to enter property to obtain information, rather than to seize property or a person. He pointed out that two circuit courts of appeals had authorized this type of search warrant under the language of the current rule.

Judge Davis explained that the advisory committee would expand the definition of "property" in the text of the revised rule, at subparagraph (a)(2)(A), to include "information." Likewise, new paragraph (b)(1) would authorize a judge to issue a warrant, not only to search and seize, but also to "covertly observe," a person or property.

Judge Davis pointed out that new paragraph (f)(5) would require the holder of the warrant to notify the owner of the property by delivering a copy of the warrant within seven days. On the government's motion, the court could extend the time to deliver the warrant to the property owner on one or more occasions.

Judge Miller reported that he had used the Administrative Office's electronic list-server to ask all magistrate judges about their experience with covert searches. He said that the responses from the magistrate judges demonstrated that these searches were being used widely, especially in environmental cases. He added, though, that covert search warrants are a matter of general concern to magistrate judges because neither the rule nor a statute authorizes them explicitly. He added that magistrate judges were unanimous in asking the advisory committee for additional guidance and authority on the matter.

One member suggested that the proposed amendment may be inappropriate because it could be viewed as a substantive law. Professor Schlueter replied that the advisory committee had intended only to provide the procedures for a practice that has been in common use for years.

Judge Davis added that the advisory committee had agreed by a split vote to include covert entry warrants in the revised rule because it is better to have clear recognition of them in the rules, rather than to have judges rely on a limited body of case law. When asked to elaborate on why some members of the advisory committee had opposed the provision, Judge Davis responded that the reasons cited included: (1) objections to covert entry searches as a

matter of policy; (2) concerns over the adequacy of the notice provisions in the proposed rule; and (3) a sense that case law should be given additional time to develop.

FED. R. CRIM. P. 42

Judge Davis reported that revised Rule 42 *(criminal contempt)* sets out more clearly the procedures for conducting a contempt proceeding. It would also add language to reflect the holding of the Supreme Court in *Young v. United States ex rel Vuitton,* 481 U.S. 787 (1987), that the court should ordinarily request that a contempt be prosecuted by a government attorney. A private attorney should not be appointed unless the government first refuses to prosecute the contempt.

FED. R. CRIM. P. 43

Judge Davis said that Rule 43 *(defendant's presence)* requires the defendant to be present at various proceedings in a criminal case. But a new exception would be added to subdivision (a) to reflect the proposed amendments to Rules 5 and 10, allowing video teleconferencing of initial appearances and arraignments. Thus, the language of the revised rule would provide that the defendant must be present "(u)nless this rule, Rule 5, or Rule 10 provides otherwise."

FED. R. CRIM. P. 46

Professor Schlueter reported that subdivision (i) to Rule 45 *(release from custody)* had been difficult to restyle. It had been added to the rules by Congress and was awkwardly written. The advisory committee, he said, decided not to make any change in what appeared to be the intention of Congress.

FED. R. CRIM. P. 48

Professor Schlueter stated that Rule 48 *(dismissal)* gives a court authority to dismiss charges against the defendant due to government delay. He pointed out that it is a speedy trial provision that was in effect before enactment of the Speedy Trial Act. The advisory committee, he said, was concerned that if it merely restyled Rule 48, its action might have the unintended effect of overruling the Speedy Trial Act through the supersession clause of the Rules Enabling Act. 28 U.S.C. § 2072(b).

Professor Schlueter said that the advisory committee was of the view that the separate provisions of Rule 48 are still viable, as they cover pre-indictment delays. Therefore, it decided to state explicitly in the committee note that Rule 48 operates independently of the Speedy Trial Act and that no change is intended in the relationship between the rule and the Act.

FED. R. CRIM. P. 49

Professor Schlueter reported that subdivision (c) of Rule 49 *(serving and filing papers)* would be broadened to reflect the changes being made in FED. R. CIV. P. 5(b) and 77(b) to permit a court to provide notice of its judgments and orders by electronic and other means.

FED. R. CRIM. P. 51

Professor Schlueter reported that the restyling of Rule 51 *(preserving claimed error)* raised another supersession clause issue. The advisory committee would add a new sentence at the end of the rule to state explicitly that any ruling admitting or excluding evidence is governed by the Federal Rules of Evidence. The committee, he said, was concerned that without the sentence an argument might be made that re-enactment of Rule 51 would supersede FED. R. EVID. 103.

FED. R. CRIM. P. 53

Professor Schlueter reported that the word "radio" would be deleted from Rule 53 *(courtroom photographing and broadcasting prohibited)*. In addition, he said, the advisory committee had been concerned as to whether other rules may allow video teleconferencing in light of Rule 53's blanket prohibition on broadcasting judicial proceedings from the courtroom. Therefore, it would add language to Rule 53 to recognize explicitly that the rules themselves may contain exceptions to the prohibition, such as the proposed amendments to Rules 5 and 10 authorizing video teleconferencing of initial appearances and arraignments.

The committee without objection approved for publication and comment:

1. **the package of proposed style revisions to Rules 1-60;**
2. **the separate package of proposed amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43.**

2. Rules Governing §§ 2254 and 2255 Proceedings

Judge Davis reported that the advisory committee had appointed an ad hoc subcommittee to review the Rules Governing § 2254 Cases and § 2255 Proceedings to determine whether any changes were required as a result of the Antiterrorism and Effective Death Penalty Act of 1996. In addition, he said, the subcommittee had tried without success to combine the two sets of rules.

RULE 1

Judge Davis said that advisory committee had recommended amending Rule 1 *(scope of the rules)* of both sets of rules to make them applicable to actions brought under 28 U.S.C. § 2241, which most commonly involve prisoners challenging the execution of their sentence. But, he said, a number of complications had been discovered recently, and the advisory committee decided to withdraw the proposed amendments to Rule 1.

RULE 2

Judge Davis explained that the language of Rule 2 *(petition)* of both sets of rules would be amended to conform to the usage of FED. R. CIV. P. 5(e). Thus, the reference would be to a petition "filed with" the clerk, rather than one "received by" the clerk.

RULE 3

Judge Davis said that Rule 3 of both sets of rules *(filing petition)* would also be amended to conform with the language of FED. R. CIV. P. 5(e). The first part of the rule would be deleted because it conflicts with the requirement of FED. R. CIV. P. 5(e) that the clerk must file any papers submitted, but may refer them to the court for consideration of any defects.

RULE 6

Judge Davis reported that Rule 6 *(discovery)* of the § 2254 Rules would be amended to correct a statutory reference to the Criminal Justice Act.

RULES 8 and 10

Judge Davis said that the only changes proposed in Rules 8 *(evidentiary hearing)* and 10 *(powers of magistrate judges)* would reflect the change in the title of United States magistrate to United states magistrate judge.

RULE 9

Judge Davis reported that the only substantive change proposed in the §§ 2254 and 2255 Rules was found in Rule 9 *(delayed or successive petitions)*. He said that both sets of rules would be amended to reflect the provisions of the Antiterrorism and Effective Death Penalty Act imposing limits on the ability of a petitioner to file successive habeas corpus petitions. The Act provides that a second or successive petition must first be presented to the court of appeals for an order authorizing the district court to consider it.

One of the participants suggested that the language of the proposed amendment, which would require the applicant to "move" for an order in the court of appeals, may be inadequate. He pointed out that petitioners will inevitably claim that they have in fact

"moved" for an order authorizing the district court to consider the petition, whether or not the court of appeals has granted the order. Therefore, he suggested that the pertinent sentence be restructured to provide that a district court may not consider a petition until the court of appeals has authorized it to do so. Judge Scirica announced that there was a consensus on the committee to make the suggested change.

One of the members pointed out that there was a gender-specific reference on line 6 of Rule 3 of the § 2255 Rules that should be restyled. Professor Schlueter responded that the advisory committee had made only minimal changes in the rules, and it was not proposing any amendments to the part of the rule that contains the gender-specific reference. He added that the advisory committee had not attempted to restyle or modernize the §§ 2254 and 2255 Rules and had agreed to defer that project to a future date.

Some participants suggested that it would be very simple to take care of the specific reference in Rule 3. They added that all rules published for comment should be gender neutral as a matter of policy. Judge Scirica asked the chairs and reporters to work together to develop a uniform policy on this matter for all the rules.

The committee without objection approved for publication and comment the proposed amendments to the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings.

After the meeting, it was discovered that the materials before the committee contained the proposed corrections to the Criminal Justice Act references: (1) in Rule 6(a) of the § 2254 Rules, but not in Rule 8(c) of the § 2254 Rules; and (2) in Rule 8(c) of the § 2255 Rules, but not in Rule 6(a) of the § 2255 Rules. **The committee by mail vote approved correcting the Criminal Justice Act references in Rules 6(a) and 8(c) of both sets of rules.**

3. Financial Disclosure

The advisory committee's proposed new Rule 12.4 was discussed and approved separately, as part of the Standing Committees consideration of proposed financial disclosure rule amendments. (See pages 28-31 of these minutes.)

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur and Professor Capra presented the report of the advisory committee, as set forth in Judge Shadur's memorandum and attachments of May 1, 2000. (Agenda Item 9)

Judge Shadur reported that he had informed the committee in January 2000 that the advisory committee had completed its review of all the evidence rules and it was now engaged in some specific projects. He pointed out, for example, that the advisory committee was looking at privileges, under the direction of a subcommittee chaired by Judge Jerry Smith. He added that the committee was very conscious of the controversial nature of attempting to do anything in the area of privileges.

Judge Shadur also pointed out that the advisory committee had considered proposed amendments to FED. R. EVID. 608 and 804, which might be brought to the attention of the Standing Committee at its next meeting.

Judge Shadur reported that Professor Capra had produced a study and report for the advisory committee on those rules of evidence in which the case law has diverged materially from either the apparent meaning of the rule or the committee note. The document, he said, would be very useful in avoiding traps for the unwary practitioner. He added that the Federal Judicial Center and others had agreed to publish it. He emphasized that the advisory committee makes it clear that the document had been prepared simply to assist the bar, and it does not constitute an official committee note.

FINANCIAL DISCLOSURE

Judge Scirica pointed out that the committee had spent a good deal of time on financial disclosure issues at its January 2000 meeting. He said that financial disclosure was not, strictly speaking, a procedural issue. Nevertheless, there had been some embarrassing incidents reported in the press, and the Codes of Conduct Committee was urging the rules committees to promulgate new federal rules on financial disclosure.

FED. R. APP. P. 26.1
FED. R. CIV. P. 7.1
FED. R. CRIM. P. 12.4

Judge Scirica said that the draft amendments to the appellate, civil, and criminal rules set forth in Agenda Item 11 of the materials were all based on current FED. R. APP. P. 26.1 *(corporate disclosure statement).* Rule 26.1 requires a nongovernmental corporate party to file a statement with the court of appeals identifying all its parent corporations and listing any publicly held company that owns 10% or more of its stock.

Judge Scirica pointed out that there is currently no corresponding national rule requiring corporate disclosure in the district courts, although 19 district courts have adopted a version of FED. R. APP. P. 26.1 as a local rule. Moreover, many individual judges impose their own, additional disclosure requirements.

Judge Scirica said that the most recent proposal before the committee, submitted jointly by the reporters, contains a two-track proposal: (1) a national rule requiring minimal information; and (2) additional requirements that could be adopted by the Judicial Conference at a later date. He said that inclusion of this provision in the proposal would give the judiciary the flexibility to make adjustments promptly if circumstances change.

Thus, the proposed new FED. R. CIV. P. 7.1, and its counterparts in the criminal and appellate rules, would be based on the current FED. R. APP. P. 26.1, in that it would require a party to file two copies of either: (1) a statement that identifies its parent corporations and any publicly held company that owns 10% of more of its stock; or (2) a statement declaring that it has nothing to report under the rule. But a party would also have to file copies of any supplemental information required by the Judicial Conference. The statements would be filed by a party with its first appearance, pleading, petition, motion, response or request addressed to the court. A party would also be required to file a supplemental statement promptly upon any change in circumstances.

Professor Coquillette pointed that there was a fundamental difference of opinion between the Codes of Conduct Committee and the advisory committees. The Codes of Conduct Committee, he said, favored adopting civil and criminal rules that essentially just repeat FED. R. APP. P. 26.1. It contends that the provision allowing the Judicial Conference to require additional information is unnecessary.

On the other hand, the advisory committees believe that simply adopting the appellate rule is insufficient. They contend that authorizing additional requirements is necessary because it would give the Judicial Conference authority to make changes from time to time, without having to invoke all the formality and take all the time required by the rulemaking process. In addition, he said, additional requirements could be developed by Judicial Conference resolution and put in place very quickly — well before the two to three years that it would take for new federal rules to take effect. One member added that immediate Conference action would be more impressive for political and public reasons than adopting a rule that would take up to three years to take effect.

Some participants suggested that the whole subject involved an administrative matter that does not belong in the federal rules. They argued that it should be handled by Judicial Conference resolution alone. They added that the Conference could simply ask the Director of the Administrative Office to issue a standard form that parties would have to complete for the clerk, similar to the form that parties must now complete disclosing whether they are involved in any related cases.

Other members replied, however, that the Judicial Conference was not likely to approve a form without a rule, especially when the Codes of Conduct Committee is opposed to having a form and is urging adoption of a rule. Another participant said that if the Judicial Conference were merely to issue a form, it would likely not have the authority to preclude local variations. By acting through the rules process, there would be clear authority to require national uniformity.

Some members added that a federal rule on financial disclosure statements was both appropriate and beneficial because it would give direction to the bar and inform the parties of their obligations. It was also pointed out that FED. R. APP. P. 26.1 has been in place for more than a decade and has been very effective.

One member said that he would vote to approve both the new rule and the additional requirements, but he pointed out that the proposal was really unnecessary on the merits. He argued that it would not solve the real issues of recusal, nor would it address the kinds of problems that had generated the negative press reports. He argued that the matter was largely a political and media issue.

Professor Coquillette reported that the proposed new civil, criminal, and appellate rules on financial disclosure were identical, except in one respect. He explained that the Advisory Committee on Civil Rules was of the view that the rule should contain a specific requirement that the clerk of court actually deliver a copy of the disclosure statements to each judge acting in the case. Professor Cooper added that the advisory committee was convinced that the provision was justified by differences in district court practice from appellate practice. Judge Rosenthal commented that the issue was of concern to the district courts, as opposed to the courts of appeals, because district judges and magistrate judges cannot otherwise count on promptly receiving every piece of paper that is filed. Judge Davis added that the criminal rule should be the same as the civil rule. Judge Garwood pointed out, however, that the appellate rules committee saw no need for such a requirement in the courts of appeals.

Professor Coquillette said that another key issue was whether the new national rules should allow local court variations. He explained that FED. R. APP. P. 26.1 does not address the matter, but its accompanying committee note invites the courts of appeals to expand on the information that must be disclosed by corporate parties. He said that all but three of the circuits in fact do so, and they solicit information about such matters as subsidiaries, partnerships, and real estate holdings. He noted that the proposals now before the committee, like Rule 26.1, would not prohibit courts from expanding on the national disclosure requirements.

Judge Scirica added that there is no agreement among the courts themselves on what information should be disclosed, as illustrated graphically by the wide variety of local circuit court rules expanding on FED. R. APP. P. 26.1. He said that there might be strong opposition within the Judicial Conference to any proposed amendment that would eliminate the current

authority of courts to add local disclosure requirements. Therefore, he said, it makes good sense to present the Conference with proposals that allow some local variations.

Professor Cooper pointed out that FED. R. APP. P. 26.1 had been narrowed recently to eliminate the requirement that corporate parties disclose their subsidiaries, although some circuits continue to require this information through local rules. He said that there is a bewildering array of material contained in the local circuit rules that could be considered for inclusion in the future, but the matter would best be handled through additional requirements set forth by the Judicial Conference.

Judge Scirica and Professor Coquillette said that the Codes of Conduct Committee was opposed to allowing local court variations from the national requirement, but it had indicated that it would defer to the rules committee on this matter.

The committee approved the proposed amendment to FED. R. APP. P. 26.1 and the proposed new FED. R. CIV. P. 7.1 and FED. R. CRIM. P. 12.4 without objection.

ATTORNEY CONDUCT

Judge Scirica reported that the special subcommittee on attorney conduct had conducted a superb conference with members of the bench and bar in February 2000 and had received many useful suggestions. He said that considerable progress had been made toward reaching a consensus on draft rules — if draft rules were to be promulgated — and that Professors Cooper and Coquillette had refined the earlier draft proposals. He pointed out that several alternatives were still under consideration, and that the subject matter of attorney conduct had been divided into three potential federal rules:

1. a suggested Federal Rule of Attorney Conduct 1 to govern attorneys generally;

2. a possible Federal Rule of Attorney Conduct 2 to address certain problems faced by federal government attorneys; and

3. a possible Federal Rule of Attorney Conduct 3 to address attorney conduct in bankruptcy practice.

Professor Coquillette said that the enabling statute requires the Judicial Conference to work towards procedural consistency in the federal courts. But, he said, attorney conduct is an area in which there is now virtually no consistency among the courts. He added that about 30% of the federal courts have not adopted local rules consistent with the conduct rules of their states.

Professor Coquillette said that the area in which the most progress can be made is with proposed Federal Rule of Attorney Conduct 1. He reported that there is now a clear consensus that attorney conduct should be governed generally by the states. He added that his research, and that of the Federal Judicial Center, had revealed that there were very few issues of exclusively federal conduct. Therefore, promulgation of a general federal rule requiring that a federal court to follow the attorney conducts rules of the state in which they are located would eliminate about 200 existing local federal court rules and restore vertical consistency to the system.

Professor Coquillette said that Federal Rules of Attorney Conduct 2 and 3 could be taken up after Rule 1. He pointed out that there are legitimate federal interests that need to be protected, and he recognized that the Department of Justice has real concerns that must be addressed. He noted that pending legislation in Congress, if enacted, would require the judiciary to propose specific solutions to government attorney problems within prescribed one-year and two-year time frames. With regard to bankruptcy practice, he said, the Advisory Committee on Bankruptcy Rules has the expertise to address attorney conduct issues, but it would prefer to wait until final decisions are made regarding proposed Federal Attorney Conduct Rule 1.

Professor Coquillette reported that Professor Cooper had prepared six variations of a proposed Federal Attorney Conduct Rule 1, set forth in Agenda Item 10 of the committee materials. The six versions vary in the level of detail, he said, but all share the common theme that federal courts should look to state law on matters of professional responsibility. They also recognize, however, that federal courts must retain control over their own practice and procedure, and they have a statutory responsibility to control who may appear before them as an attorney.

Chief Justice Veasey said that the Conference of Chief Justices would support the simplest of the six variations, *i.e.*, a single sentence specifying that state attorney conduct rules apply. He expressed concern about proposed Federal Rule of Attorney Conduct 2. Professor Coquillette responded that the proposed rules will not be approved by the Judicial Conference unless there is a clear consensus for them. Mr. Marcus added that the Department of Justice had no problems with Federal Rule of Attorney Conduct 1, but it needed to have its special concerns and problems addressed, either by legislation or by a new Federal Rule of Attorney Conduct 2.

One member emphasized that there were essential federal interests at stake beyond those of the Department of Justice. He said that states may go too far in attempting to regulate conduct, as local bars or other interest groups within a state may seek to leverage ethics rules for their own purposes. Thus, it would not be appropriate to declare that anything a state chooses to include in its ethics rules should necessarily be binding on a federal court.

One member said that it was unlikely that there would be a resolution of the Department's concerns until after the next national election. He pointed out that negotiations between the Department and the states had not produced a final agreement on the issue of contacts by government attorneys with represented parties. Moreover, he said, there were substantial differences in Congress, and between the two houses of Congress, on the appropriate roles of the Department of Justice and the states in controlling government attorney conduct. The McDade amendment, he said, is still law, although there is legislation pending to repeal or modify it. And the American Bar Association is in the process of actively considering these conduct issues as part of its Ethics 2000 project.

REPORT OF THE LOCAL RULES PROJECT

Professor Coquillette stated that the local rules project had three goals: (1) to identify inconsistent local rules, (2) to identify areas where there are subjects addressed in local court rules that should be addressed in the national rules; and (3) to encourage the courts to post orders and practices on the Internet in order to assist the bar. He noted that recent amendments to FED. R. CIV. P. 83(b), requiring an attorney to have actual notice of any procedural requirement not set forth in a local rule, had its genesis in the last local rules project.

Professor Squiers reported that she had been working on the new local rules project since the summer. She said that she had read all the local rules of the district courts and had entered them into a computer program, sorted by rule content and topic. She added that she had just started work on writing the report and would have substantial material to present to the committee at its January 2001 meeting.

Professor Squiers said that she had contacted the circuit executives to inquire about the activities of their respective circuit councils in reviewing local district court rules. She reported that the circuit executives had responded that neither they nor their circuit councils are directly involved in the rulemaking process for the district courts or in the actual promulgation of local district court rules. She added, however, that some circuits had on occasion suggested local rules for the districts to adopt.

Professor Squiers reported that all the circuit councils have some sort of review process in place to examine new local rules and amendments to existing local rules. But, she added, none of the circuits has written standards to determine what may constitute an "inconsistency" between a local rule and a national rule or statute. Rather, reviews of local rules and amendments are made by the councils on a case-by-case basis.

Professor Squiers also said that she had asked the circuit executives about the existence of standing orders, internal operating procedures, general orders, and other written directives that serve as the functional equivalent of local rules. She reported that there is

generally no review of these directives in most of the circuits, but that councils clearly would act if any of these devices were seen as an attempt to avoid the local rulemaking process.

Some members stated that local orders and practices are a serious problem for the bar and have taken on the character of local rules. They recommended that Professor Squiers obtain copies of standing orders and similar documents. Judge Scirica agreed, and he suggested that Professor Squiers write to the chief judges of the circuits on the matter.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte reported that one of the most important policy issues currently facing the judiciary is to identify and protect appropriate privacy interests as part of its implementation of the new Electronic Case Files project. The project, which is finishing its pilot stage and is about to begin national deployment, places the documents in a case file in electronic form and makes them available to the public through the Internet. He said that there is a tension between: (1) the long-established policy and common law right of public access to court records; and (2) the privacy interests of litigants and third parties when court documents contain sensitive personal, medical, financial, and employment records. These records, he said, to date have been "practically obscure" in court files, but would now be placed on Internet for world-wide distribution.

Mr. Lafitte pointed out that the Court Administration and Case Management committee had appointed a special subcommittee on privacy to sort out the issues and that he was the liaison to that subcommittee from the rules committees. He reported that the subcommittee was considering several alternatives and was seeking feedback from the rules committees and other Judicial Conference committees. Eventually, he said, the subcommittee would circulate a draft document for public comment and present its views to the various Judicial Conference committees at their winter 2000-2001 meetings. Then the Court Administration and Case Management Committee would likely make appropriate recommendations to the Judicial Conference in March 2001.

Mr. Lafitte said that six alternatives were under consideration. He noted that they were summarized very effectively in Professor Capra's memorandum in Agenda Item 12 of the meeting materials. The alternatives, he said, were as follows:

1. Do Nothing – Under this alternative, privacy interests would be decided on a case-by-case basis, as litigants could seek protective orders and sealing orders from the court by way of motion.

2. "Public is public" – Under this alternative, everything now available to the public in the court's paper file would be made available in electronic form. This alternative, Mr. Lafitte said, would be similar to the "Do Nothing" approach.

3. "Public is Public," But Limit What is Public – This alternative would treat paper files and electronic files in the same way, but the public file would be refined. Thus, certain kinds of sensitive information now available at the courthouse would be excluded from the public file, such as social security numbers or medical information.

4. Limited Remove Electronic Access – This alternative would allow electronic access to all public information at the courthouse, but certain categories of information could not be accessed remotely through the Internet. Mr. Lafitte said that members of the privacy subcommittee had expressed concerns over this approach because it would result in different access policies for the same information.

5. Waiting Period – Under this alternative, a waiting period would be imposed between the electronic filing of a document and its posting on the Internet. The parties would have an opportunity during this period to ask the court for a protective order on a document-by-document basis.

6. Case File Archiving – A policy would be developed to archive documents and limit the life span of a case on the Internet. Mr. Lafitte observed that this action did not address the main issues at stake.

Professor Capra said that the only option that was likely to require a rule-based solution was Alternative 3, limiting what is included in the public file. He said, however, that this approach would be controversial, and it would be bound to encounter objections from news organizations, which have enjoyed full access to all paper records for years.

Professor Capra pointed out that the new electronic system is technically capable of providing different categories of users with different levels of access. Thus, for example, the parties to a case might be given greater electronic access to the source documents in a case than the general public.

Professor Capra reported that the President had established a working group in the executive branch to study the issues of privacy in consumer bankruptcy cases and that Administrative Office staff would coordinate with the working group. In addition, he noted that the technology subcommittee has been in contact with the Advisory Committee on Bankruptcy Rules regarding privacy issues.

Mr. Mattos said that the Court Administration and Case Management Committee had not reached any conclusions on the key privacy issues. But, he said, there is a consensus on the committee that: (1) parties in a case should be given notice that their documents are public and may be placed on the Internet; and (2) the bar should be educated as to the public nature of the documents they file.

Several members suggested that consideration be given to the administrative burdens of operating an electronic system in which some official case documents are included and some are not. They said that if electronic public access is to be limited, the focus should be placed on excluding categories of cases, rather than categories of documents.

Professor Capra noted that the proposed new amendments to the federal rules that authorize electronic service — together with the current rules that authorize electronic filing — contemplate the use of local rules to implement a court's electronic procedures. He said that the technology subcommittee thought that it might be useful to prepare sample local rules and orders to assist the courts as they implement the electronic case files system. In addition, he said, Administrative Office staff could serve as an effective clearing house of information to inform courts about the rules, orders, and procedures that have been adopted by other courts.

STATISTICS

Mr. Rabiej reported that the Administrative Office was seeking better statistical data and other information on district court proceedings, which could be captured through the new electronic case management and case file system being developed. This effort is part of the implementation of Recommendation 73 of the *Long Range Plan for the Federal Courts*, which calls for the courts to "define, structure, and, as appropriate, expand their data-collection and information-gathering capacity" to obtain better data for judicial administration, planning, and policy development.

Mr. Rabiej said that the Administrative Office was asking the committee to identify any types of new data and other information that it might need to assist in its mission, such as empirical data on the impact of various procedural requirements set forth in the rules. He pointed out that Administrative Office and Federal Judicial Center staff had prepared preliminary tables identifying and prioritizing various types of case events that might be useful in conducting future research for the committees. He recommended that the reporters review the materials and offer suggestions to the staff.

NEXT COMMITTEE MEETING

The next committee meeting had been scheduled for January 4 and 5, 2001.

Respectfully submitted,

Peter G. McCabe,
Secretary