COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 22-23, 2006
Washington, D.C.

TABLE OF CONTENTS

Attendance..... 1
Introductory Remarks..... 3
Approval of the Minutes of the Last Meeting..... 4
Report of the Administrative Office..... 5
Report of the Federal Judicial Center..... 6
Technology Subcommittee Report..... 6
Reports of the Advisory Committees:
- Appellate Rules..... 8
- Bankruptcy Rules..... 9
- Civil Rules..... 18
- Criminal Rules..... 24
- Evidence Rules..... 36

Time-Computation Subcommittee Report..... 40
Long-Range Planning 46
Next Committee Meeting..... 47

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 22-23, 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
Deputy Attorney General Paul J. McNulty
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, Jeffrey N. Barr, and Timothy K. Dole, attorneys 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., consultant to the committee. Professor R. Joseph Kimble, style consultant to the committee, participated by telephone in the meeting on June 23.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
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

Deputy Attorney General McNulty attended part of the meeting on June 22. The Department of Justice was also represented at the meeting by Associate Attorney General Robert D. McCallum, Jr.; Alice S. Fisher, Assistant Attorney General for the Criminal Division; Ronald J. Tenpas, Associate Deputy Attorney General; Benton J. Campbell, Counselor to the Assistant Attorney General; and Jonathan J. Wroblewski and Elizabeth U. Shapiro of the Criminal Division.

INTRODUCTORY REMARKS

Judge Levi welcomed Supreme Court Justice Samuel A. Alito, Jr. to the meeting and presented him with a plaque honoring his service as a member and chair of the Advisory Committee on Appellate Rules.

Later in the day, Chief Justice John G. Roberts, Jr. came to the meeting, greeted the members, and spent time with them in informal conversations. Judge Levi presented the Chief Justice with a framed resolution expressing the committee's appreciation, respect, and admiration for his support of the rulemaking process and his service as a member of the Advisory Committee on Appellate Rules. Judge Levi noted that the Chief Justice had been nominated as the next chair of that committee, but his elevation to the Supreme Court had intervened with the succession. The Chief Justice expressed his appreciation for the work of the rules committees and emphasized that he had experienced that work from the inside.

Judge Levi reported that Professor Struve had been appointed by the Chief Justice as the new reporter for the Advisory Committee on Appellate Rules, succeeding Patrick Schiltz, who had just been sworn in as a district judge in Minnesota. Judge Levi pointed out that Professor Struve had written many excellent law review articles and has been described as "shockingly prolific."

Judge Levi noted that Dean Kane would retire as dean of the Hastings College of the Law on June 30, 2006. He also reported that she, Judge Murtha, and Judge Thrash would be leaving the committee because their terms were due to expire on September 30, 2006. He said that their contributions to the committee had been enormous, particularly as the members of the committee's Style Subcommittee. He also reported with sadness that the terms of Judge Fitzwater and Justice Wells were also due to expire on September 30, 2006. They, too, had made major contributions to the work of the committee and would be sorely missed. He noted that all the members whose terms were about to expire would be invited to the next committee meeting in January 2007.

Judge Levi noted that the civil rules style project had largely come to a conclusion. The committee, he said, needed to make note of this major milestone. He said that the style project was extremely important, and it will be of great benefit in the future to law students, professors, lawyers, and judges. The achievement, he emphasized, had been the joint product of a number of dedicated members, consultants, and staff.

In addition to recognizing the Style Subcommittee – Judges Murtha and Thrash and Dean Kane – Judge Levi singled out Judge Rosenthal, chair of the Advisory Committee on Civil Rules, and Judges Paul J. Kelly, Jr. and Thomas B. Russell, who served as the chairs of the advisory committee's two style subcommittees. Together, they shepherded the style project through the advisory committee. Judge Levi also recognized

the tremendous assistance provided by Professors R. Joseph Kimble, Richard L. Marcus, and Thomas D. Rowe, Jr., and by Joseph F. Spaniol, Jr., all of whom labored over countless proposed drafts, wrote and read hundreds of memoranda, and participated in many meetings and teleconferences.

Judge Levi also thanked the staff of the Administrative Office for managing the process and providing timely and professional assistance to the committees – Peter G. McCabe, John K. Rabiej, Jeffrey A. Hennemuth, Robert P. Deyling, and Jeffrey N. Barr, and their excellent supporting staff – who keep the records, arrange the meetings, and prepare the agenda books. Finally, he gave special thanks to Professor Cooper who, he emphasized, had been the heart and soul of the style project. Professor Cooper was tireless and relentless in reviewing each and every rule with meticulous care and great insight. He helped shape every decision of the committee.

Judge Levi said that there was little to report about the March 2006 meeting of the Judicial Conference. He noted that the Supreme Court had prescribed the proposed rule amendments approved by the Judicial Conference in September 2005, including the package of civil rules governing discovery of electronically stored information. The amendments, now pending in Congress, are expected to take effect on December 1, 2006.

Judge Levi also thanked Brooke Coleman, his rules law clerk, for her brilliant work over the last several years in assisting him in all his duties as chair of the committee. He noted that she would soon begin teaching at Stanford Law School.

Judge Levi reported that Associate Attorney General McCallum had been nominated by the President to be the U.S. ambassador to Australia. Accordingly, he said, this was likely to be Mr. McCallum's last committee meeting. He emphasized that he had been a wonderful member and had established a new level of cooperation between the rules committees and the Department of Justice. He said that it is very important for the executive branch to be involved in the work of the advisory committees, especially when its interests are affected. He noted that the Department is a large organization, and its internal decision making on the federal rules works well only when its top executives, such as the Associate Attorney General, are personally involved. He emphasized that Mr. McCallum had attended and participated in all the committee meetings, and that he is a brilliant lawyer and a great person.

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, 2006.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on three legislative matters affecting the rules system. First, he pointed out that the Rules Enabling Act specifies that, unlike other amendments to the federal rules, any rule that affects an evidentiary privilege must be enacted by positive statute. He noted that the Advisory Committee on Evidence Rules had been working for several years on potential privilege rules, including a rule on waiver of the attorney-client privilege and work product protection. But before the committee could proceed seriously with a privilege waiver rule, it should alert Congress to all the relevant issues and obtain its acceptance in pursuing legislation to enact the rule. Accordingly, he said, Judge Levi and he had met on the matter with the chairman of the Judiciary Committee of the House of Representatives, F. James Sensenbrenner, Jr.

Chairman Sensenbrenner recognized that legislation would be necessary to implement the rule. Judge Levi reported that the chairman was very supportive and had urged the committee by letter to promulgate a rule that would: (1) protect against inadvertent waiver of privilege and protection, (2) permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and (3) allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in later proceedings.

Mr. Rabiej reported that the Advisory Committee on Evidence Rules had drafted a proposed rule, FED. R. EVID. 502, addressing the three topics suggested by Chairman Sensenbrenner. He added that Judge Levi would meet on June 23 with the chief counsel to the Senate Judiciary Committee and others to discuss the proposed rule.

Second, Mr. Rabiej reported that the Advisory Committee on Bankruptcy Rules had produced a comprehensive package of amendments and new rules to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed out that two senators had written recently to the Chief Justice objecting to three provisions in the advisory committee's proposed rules. The Director of the Administrative Office responded to the senators by explaining the basis for the advisory committee's decisions on these provisions and emphasizing that the committee would examine afresh the senators' suggestions, along with other comments submitted by the public, as part of the public comment process.

Third, Mr. Rabiej noted that a provision of the Class Action Fairness Act of 2005 required the Judicial Conference to report on the best practices that courts have used to make sure that proposed class action settlements are fair and that attorney fees are reasonable. He said that the Judicial Conference had filed the report with the judiciary committees of the House and Senate in February 2006. The thrust of the report emphasized that the extensive 2003 revisions to FED. R. CIV. P. 23 had provided the

courts with a host of rule-based tools, discretion, and guidance to scrutinize rigorously class action settlements and fee awards. The revised rule was intended largely to codify and amplify the best practices that district courts had developed to supervise class action litigation.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending projects of the Federal Judicial Center. He directed the committee's attention to two projects.

First, he noted, the Center was working with the Administrative Office to monitor developments in the courts following the Class Action Fairness Act of 2005. He said that the study was showing that class-action filings had increased since the Act. But not many class action cases are being removed from the state courts. Rather, he said, cases that previously would have been filed in the state courts are now being filed in the federal courts as original actions.

Second, the Center was studying the issue of appellate jurisdiction and how it affects resources in the appellate courts and district courts. He said that the Center would examine the exercise of jurisdiction under 28 U.S.C. § 1292(b), and a report would be forthcoming soon. He added, in response to a question, that concerns had been expressed regarding § 1292(b) motions in patent cases. He said that it had been difficult in the past to get district courts to certify an appeal and for the courts of appeals to accept the appeal. But the reluctance seems to have diminished, and changes are being seen.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Rules for Final Approval

FED. R. APP. P. 25(a)(5)
FED. R. BANKR. P. 9037
FED. R. CIV. P. 5.2
FED. R. CRIM. 49.1

Judge Fitzwater explained that the four proposed rules have been endorsed by the Technology Subcommittee and the respective advisory committees. They comply with the requirement of the E-Government Act of 2002 that rules be prescribed "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The substance of the proposed rules, he said, was based on the privacy policy already developed by the Court Administration and Case Management Committee and adopted by the Judicial Conference. In essence,

since all federal court documents are now posted on the Internet, the proposed rules impose obligations on people filing papers in the courts to redact certain sensitive information to protect privacy and security interests.

Professor Capra added that the statute specifies that the rules must be uniform "to the extent practicable." He referred to the chart in the agenda book setting forth the proposed civil, criminal, and bankruptcy rules side-by-side and demonstrating how closely they track each other. (The proposed amendment to the appellate rules would adopt the privacy provisions followed in the case below.) He said that the subcommittee and the reporters had spent an enormous amount of time trying to make the rules uniform, even down to the punctuation. He pointed out that individual rules differ from the template developed by the Technology Subcommittee only where there is a special need in a particular set of rules. For example, a special need exists in criminal cases to protect home addresses of witnesses and others from disclosure. Therefore, the criminal rules, unlike the civil and bankruptcy rules, require redaction of all but the city and state of a home address in any paper filed with the court. Professor Coquillette added that the consistent policy of the Standing Committee since 1989 has been that when the same provision applies in different sets of federal rules, the language of the rule should be the same unless there is a specific justification for a deviation.

Judge Levi pointed out that the Court Administration and Case Management Committee had raised two concerns with the proposed privacy rules. First, that committee had suggested that the criminal rules require redaction of the name of a grand jury foreperson from documents filed with the court. But, he said, the signature of a foreperson on an indictment is essential, and there has been litigation over the legality of an indictment that does not bear the signature of the foreperson.

Second, the Court Administration and Case Management Committee had raised concerns over arrest and search warrants that have been executed. Initially, he said, the Department of Justice had argued, and the advisory committee was persuaded, that the effort required to redact information from arrest and search warrants would be considerable and that redaction of these documents should not be imposed. Now, though, the Department was suggesting that search warrants can be redacted, but not arrest warrants. Judge Levi said that he had advised the Court Administration and Case Management Committee that these matters needed to be studied further, but he did not want to delay approval of the privacy rules because of the concerns over warrants.

The committee without objection by voice vote agreed to send the proposed new rules to the Judicial Conference for final approval.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of May 22, 2006 (Agenda Item 6).

Amendments for Final Approval

FED. R. APP. P. 25(a)(5)

Judge Stewart reported that the advisory committee had met in April and that the E-Government privacy rule had been the major item on its agenda. He pointed out that the proposed appellate rule on privacy differs from the proposed civil, criminal, and bankruptcy rules in that it adopts a policy of "dynamic conformity." In other words, the appellate rule provides simply that the privacy rule applied to the case below will continue to apply to the case on appeal. He added that the advisory committee had been unanimous in approving this approach. The only objections raised in the committee related to some of the suggested style changes.

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

Informational Items

Judge Stewart reported that the other items in the committee's report in the agenda book were informational. First, he said, the advisory committee had begun to consider implementing the time-computation template developed by the Standing Committee's Time-Computation Subcommittee by establishing a subcommittee to work on it. The subcommittee would begin work this summer to consider each time limit in the appellate rules. He added that Professor Struve had initiated the project with an excellent memorandum in which she identified time limits set forth in statutes. There is concern about statutes that impose time limits, he said, because FED. R. APP. P. 26 specifies that the method of counting in the rules is applicable to statutes. One problem is that the time limits for complying with many statutes — often 10 days — may be shortened because the template calls for counting each day, while the current time computation rule excludes weekends and holidays if a time limit is less than 11 days.

Judge Stewart reported that the advisory committee had also been asked to consider the provision in the time-computation template addressing the "inaccessibility" of the clerk's office. He said that the advisory committee would add Fritz Fulbruge, clerk of the Court of Appeals for the Fifth Circuit in New Orleans, to the subcommittee. He has had relevant, actual experience with inaccessibility as a result of Hurricane Katrina.

Judge Stewart said that the advisory committee had conducted a thorough discussion of the "3-day rule" – FED. R. APP. P. 26(c). The committee voted unanimously not to make any change in the rule at the present time, but the members had a lively debate on the topic. Since electronic filing and service are just being introduced in the courts of appeals nationally, the committee will monitor their impact on the 3-day rule to see whether the rule should be modified.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 24, 2006 (Agenda Item 11).

Judge Zilly reported that the advisory committee had been very busy during the last 12 months, particularly in drafting rules and forms to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. In all, the committee had held six meetings. The most recent, held in March 2006 at the University of North Carolina in Chapel Hill, had lasted three full days, and the advisory committee took two additional votes after the meeting.

He noted that a great deal of material was being presented to the Standing Committee. In all, more than 70 changes to the rules were under consideration. He said that the advisory committee was recommending:

(1) final approval of eight rules not related to the recent bankruptcy legislation;
(2) withdrawal of one rule published for public comment;
(3) final approval of an amendment to Interim Bankruptcy Rule 1007 and a related new exhibit to the petition form;
(4) final approval of seven additional changes to the forms, to take effect on October 1, 2006;
(5) publication of a comprehensive package of amendments to the rules to implement the recent bankruptcy legislation, most of which had been approved earlier as interim rules; and
(6) publication of all the revisions in the Official Forms.

Amendments for Final Approval

Judge Zilly reported that the proposed amendments to FED. R. BANKR. P. 1014, 3001, 3007, 4001, 6006, and 7007.1 and new rules 6003, 9005.1, and 9037 had been published for comment in August 2005. A public hearing on them had been scheduled for January 9, 2006. But there were no requests to appear, and the hearing was cancelled.

He noted that the proposed Rules 3001, 4001, 6006 and new Rule 6003 had generated a good deal of public comment.

FED. R. BANKR. P. 1014(a)

Judge Zilly said that Rule 1014 (dismissal and transfer of cases) would be amended to state explicitly that a court may order a change of venue in a case on its own motion.

Joint Subcommittee Recommendations on
FED. R. BANKR. P. 3007, 4001, 6003, and 6006

Judge Zilly explained the origin of the proposed changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003. He said that about three years ago, the Bankruptcy Administration Committee of the Judicial Conference, chaired by Judge Rendell, and the Advisory Committee on Bankruptcy Rules had formed a joint subcommittee to examine a number of issues arising in large chapter 11 cases. As a result of the subcommittee's work, changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003 were published. He added that the advisory committee was recommending a number of minor changes to the four rules as a result of the public comments.

FED. R. BANKR. P. 3007

Judge Zilly explained that Rule 3007 (objection to claims) was being amended in several ways. It would preclude a party in interest from including in a claims objection any request for relief that requires an adversary proceeding. The proposed rule would allow omnibus claims objections. Objections of up to 100 claims could be filed in a single objection to claims. It would also limit the nature of objections that may be joined in a single filing, and it would establish minimum standards to protect the due process rights of claimants.

FED. R. BANKR. P. 4001

Judge Zilly noted that Rule 4001 (relief from the automatic stay and certain other matters) would be amended to require that movants seeking approval of agreements related to the automatic stay, approval of certain other agreements, or authority to use cash collateral or obtain credit submit along with their motion a proposed order for the relief requested and give a more extensive notice of the requested relief to parties in interest. The rule would require the movant to include within the motion a statement not to exceed five pages concisely describing the material provisions of the relief requested. Judge Zilly noted that the advisory committee had made some changes in the rule after

publication, including deletion of an unnecessary reference to FED. R. BANKR. P. 9024 (relief from judgment or order).

FED. R. BANKR. P. 6003

Judge Zilly explained that proposed Rule 6003 (interim and final relief immediately following commencement of a case) is new. It would set limits on a court's authority to grant certain relief during the first 20 days of a case. Absent a need to avoid immediate and irreparable harm, a court could not grant relief during the first 20 days of a case on: (1) applications for employment of professional persons; (2) motions for the use, sale, or lease of property of the estate, other than a motion under FED. R. BANKR. P. 4001; and (3) motions to assume or assign executory contracts and unexpired leases. He added that subdivision (c) had been amended following publication to delete a reference to the rejection of executory contracts or unexpired leases. The amendment, he said, allows a debtor to reject burdensome contracts or leases.

FED. R. BANKR. P. 6006

Judge Zilly reported that the proposed amendments to Rule 6006 (assumption, rejection, or assignment of an executory contract or unexpired lease) would authorize omnibus motions to reject executory contracts and unexpired leases. It would also authorize omnibus motions to assume or assign multiple executory contracts and unexpired leases under specific circumstances. The amended rule would establish minimum standards to ensure protection of the due process rights of claimants. Following publication, the advisory committee amended the rule to allow the trustee to assume but not assign multiple executory contracts and unexpired leases in an omnibus motion.

FED. R. BANKR. P. 7007.1

Judge Zilly explained that the proposed new Rule 7007.1 (corporate ownership statement) would require a party to file its corporate ownership statement with the first paper filed with the court in an adversary proceeding.

FED. R. BANKR. P. 9005.1

Judge Zilly noted that the proposed Rule 9005.1 (constitutional challenge to a statute) is new. It would make the new FED. R. CIV. P. 5.1 applicable to adversary proceedings, contested matters, and other proceedings within a bankruptcy case.

The committee without objection by voice vote agreed to send the proposed amendments and new rules to the Judicial Conference for final approval.

FED. R. BANKR. P. 9037

As noted above on page 7, the committee approved the proposed new Rule 9037 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee. Adopted in compliance with § 205 of the E-Government Act of 2002, the rule would protect the privacy and security concerns arising from the filing of documents with the court, both electronically and in paper form, because filed documents are now posted on the Internet.

Judge Zilly noted that the proposed new bankruptcy rule is similar to the companion civil and criminal rules. It is slightly different in language, though, because it uses the term "entity," a defined term under the Bankruptcy Code, rather than "party" or "person." Entity includes a governmental unit under § 101(15) of the Code, while "person" excludes it in the definition section of the Code § 101(41).

Withdrawal of an Amendment

FED. R. BANKR. P. 3001(c) and (d)

Judge Zilly reported that the advisory committee had decided to withdraw the proposed amendments to Rule 3001 (proof of claim) following publication. The current rule states that when a claim (or an interest in property of the debtor) is based on a writing, the entire writing must be filed with the proof of claim. The proposed amendments, as published, would have provided that if the writing supporting the claim were 25 pages or fewer, the claimant would have to attach the whole writing. But if it exceeded 25 pages, the claimant would have to file relevant excerpts of the writing and a summary, which together could not exceed 25 pages. Similarly, any attachment to the proof of claim to provide evidence of perfection of a security interest could not exceed five pages in length.

Judge Zilly said that the advisory committee had received several comments opposing the amendments. One organization objected to the rule on the grounds that summaries would be difficult to prepare. In light of the comments, the committee discussed increasing the page limitation on proof of perfection from five to 15 pages. After considering and debating all the comments, though, the committee decided to recommend that no changes be made to Rule 3001. But it agreed to change Form 10 (the proof of claim form) to warn users against filing original documents. The proposed language on the form would advise: "Do not send original documents. Attached documents may be destroyed after scanning."

The committee without objection approved withdrawal of the proposed amendment by voice vote.

Amendments to an Interim Rule and the Official Forms

Judge Zilly explained that to conform to the 2005 bankruptcy legislation, the committee had prepared interim rules that were then approved by the Standing Committee and the Executive Committee of the Judicial Conference for use as local rules in the courts. The interim rules had been drafted as revised versions of the Federal Rules of Bankruptcy Procedure. The courts were encouraged, but not required, to adopt them as local rules. The interim rules included 35 amendments to the existing rules and seven new rules. All the courts adopted the rules before the October 17, 2005, effective date of the bankruptcy law, some with minor variations.

In addition, the advisory committee prepared amendments to 33 of the existing Official Forms and created nine new forms, all of which were approved in August 2005 by the Standing Committee and the Judicial Conference, through its Executive Committee. The forms, under FED. R. BANKR. P. 9009, became new Official Forms and must be used in all cases.

Judge Zilly reported that the advisory committee had received comments from various sources on both the interim rules and the Official Forms. Based on those comments, it was now recommending a change in Interim Rule 1007 to require a debtor to file an official form that includes a statement of the debtor's compliance with the new pre-petition credit counseling obligation under § 109(h) of the Code. The amendment would be sent to the courts with the recommendation that it be adopted as a standing order effective October 1, 2006. Also based on the comments, the advisory committee was recommending changes to OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, and 23 and new Exhibit D to OFFICIAL FORM 1. In addition, he said, the advisory committee recommended having the Judicial Conference make the changes in the Official Forms and have them take effect on October 1, 2006.

FED. R. BANKR. P. 1007

Judge Zilly explained that the 2005 Act had amended § 109(h) of the Bankruptcy Code to require that all individual debtors receive credit counseling before commencing a bankruptcy case. In its current form, Interim Rule 1007 (lists, schedules, statements, and other documents) implements § 109(h) by requiring the debtor to file with the petition either: (1) a certificate from the credit counseling agency showing completion of the course within 180 days of filing; (2) a certification attesting that the debtor applied for but was unable to obtain credit counseling within 5 days of filing; or (3) a request for a determination by the court that the debtor is statutorily exempt from the credit counseling requirement.

Case law developments have shown that some debtors have completed the counseling but have been unable to obtain a copy of the certificate from the provider of the counseling. As a result, debtors have filed a petition with the court, paid a filing fee, and then had their case dismissed by the court even when they had received the counseling but not filed the certificate. The proposed amendments to Rule 1007(b) and (c) address the problem by permitting debtors in this position to file a statement that they have completed the counseling and are awaiting receipt of the appropriate certificate. In that event, the debtor will have 15 days after filing the petition to file the certificate with the court.

Professor Morris added that the advisory committee was recommending amending both the interim rule and the final Rule 1007.

The committee without objection by voice vote agreed to send the proposed amendment to the interim rule to the Judicial Conference for final approval.

OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, 23
and Exhibit D to OFFICIAL FORM 1

Judge Zilly added that the advisory committee was recommending a new Exhibit D to OFFICIAL FORM 1 (voluntary petition) to implement the proposed amendment to Rule 1007(b)(3). Exhibit D is the debtor's statement of compliance with the credit counseling requirement. Among other things, it includes a series of cautions informing debtors of the consequences of filing a bankruptcy petition without first receiving credit counseling. Many pro se debtors, for example, are unaware of the significant adverse consequences of filing a petition before receiving the requisite counseling, including dismissal of the case, limitations on the automatic stay, and the need to pay another filing fee if the case is refiled. The warnings may deter improvident or premature filings, and they should both reduce the harm to those debtors and ease burdens on the clerks, who often are called upon to respond to inquiries from debtors on these matters.

Judge Zilly added that the advisory committee was recommending that the Judicial Conference make changes in the following seven Official Forms, effective October 1, 2006:

1	Voluntary petition
5	Involuntary petition
6	Schedules
9	Notice of commencement of a case, meeting of creditors, and deadlines
22A	Chapter 7 statement of current monthly income and means test calculation

22C Chapter 13 statement of current monthly income and calculation of commitment period and disposable income
23 Debtor's certification of completion of instructional course concerning personal financial management

Judge Zilly reported that the advisory committee recommended that OFFICIAL FORMS 1, 5, and 6 be amended to implement the statistical reporting requirements of the 2005 bankruptcy legislation that take effect on October 17, 2006. The proposed amendments to OFFICIAL FORMS 9, 22A, 22C, and 23 are stylistic or respond to comments received on the 2005 amendments to the Official Forms.

Judge Zilly pointed out that each of the forms was described in the agenda book. Once approved by the Judicial Conference, he said, they would become official and must be used in all courts. But, he said, the proposed changes in the seven forms will also be published for public comment, even though they will become official on October 1, 2006, because they had been prepared quickly to meet the statutory deadline and had not been published formally.

The committee without objection by voice vote agreed to send the proposed revisions in the forms to the Judicial Conference for final approval.

Amendments to the Rules for Publication

Judge Zilly reported that the advisory committee was seeking authority to publish the interim rules – together with proposed amendments to five additional rules not included in the interim rules – as a comprehensive package of permanent amendments to implement the 2005 bankruptcy legislation and other recent legislation. They would be published in August 2006 and, following the comment period, would be considered afresh by the advisory committee in the spring of 2007 and brought back to the Standing Committee for final approval in June 2007.

Thirty-five of the rules that the advisory committee was seeking authority to publish had been approved previously by the Standing Committee. They had to be in place in the bankruptcy courts in advance of the effective date of the Act, October 17, 2005 – FED. R. BANKR. P. 1006, 1007, 1009, 1010, 1011, 1017, 1019, 1020, 1021, 2002, 2003, 2007.1, 2007.2, 2015, 2015.1, 2015.2, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5003, 5008, 5012, 6004, 6011, 8001, 8003, 9006, and 9009. Judge Zilly explained that minor modifications, largely stylistic in nature, had been made in the rules. More significant improvements had been made to nine of the rules and are explained in the agenda book – FED. R. BANKR. P. 1007, 1010(b), 1011(f), 2002(g)(5), 2015(a)(6), 3002(c)(5), 4003, 4008, and 8001(f)(5).

Judge Zilly reported that five changes to the rules in the package were new and had not been seen before by the Standing Committee. Changes to four rules were necessary to comply with the various provisions of the Act, but did not have to be in place by October 17, 2005 – FED. R. BANKR. P. 1005, 2015.3, 3016 and 9009 (the changes to 3016 and 9009 are distinct from previous changes to those rules made by the Interim Rules). In addition, the proposed change to Rule 5001 was necessary to comply with the new 28 U.S.C. § 152(c), which authorizes bankruptcy judges to hold court outside their districts in emergency situations.

He noted that the proposed amendment to Rule 1005 (caption of the petition) conforms to the Act's increase in the minimum time allowed between discharges from six to eight years. New Rule 2015.3 would implement § 419 of the Act requiring reports of financial information on entities in which a Chapter 11 estate holds a controlling or substantial interest. The proposed amendment to Rule 3016(d) (filing plan and disclosure statement) would implement § 433 of the Act and allow a reorganization plan to serve as a disclosure statement in a small business case. The amendment to Rule 9009 (forms) would provide that a plan proponent in a small business Chapter 11 case need not use the Official Form of a plan of reorganization and disclosure statement.

The committee without objection approved the proposed amendments for publication by voice vote.

Amendments to the Official Forms for Publication

Judge Zilly reported that the advisory committee recommended publishing for comment all the amendments made to the 20 forms amended or created in 2005 to implement the changes brought about because of the Act (*i.e.*, OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24). He noted that publishing for comment forms already in effect as Official Forms was an unusual step. But because the new law required so many changes to the forms, the advisory committee wanted to give the bench and bar a full, formal opportunity to comment on them.

Judge Zilly said that the advisory committee had, at the direction of Congress, finished drafting and was recommending publishing for comment, three new forms to be used in small business cases: Form 25A (sample plan of reorganization); Form 25B (sample disclosure statement); and Form 26 (form to be used to report on value, operations, and profitability as required by § 419 of the Act). He noted that new Rule 2015.3 would require the debtor in possession to file Form 26 in all Chapter 11 cases. He also said that the advisory committee's recommended new change to Rule 9009 was on account of the congressional directive that the sample plan and sample disclosure statement (Forms 25A and 25B) be illustrative only. The change excepts Forms 25A and 25B from Rule 9009's general requirement that the use of applicable Official Forms is mandatory.

The committee without objection approved the proposed forms for publication by voice vote.

Informational Items

Judge Zilly noted that when Congress enacted the 2005 legislation, it required the debtor's attorney in a Chapter 7 case to certify that the attorney has no knowledge, after inquiry, that the information provided by the debtor in the schedules and statements is incorrect. The legislation also states that it is the sense of Congress that FED. R. BANKR. P. 9011 should be modified to include a provision to that effect. In addition, he said, Senator Grassley and Senator Sessions had sent letters urging the committee to include the provision in the rule and forms.

Judge Zilly said that the advisory committee was not yet recommending any change to Rule 9011 or to any of the forms. As it stands now, he said, Rule 9011 provides that an attorney's signature on any paper filed with the court other than the schedules amounts to a certification by the attorney after a reasonable inquiry that any factual allegations are accurate. Changes made by the Act would generally extend the attorney's certification to bankruptcy schedules, at least in chapter 7. He said that it has been a long-standing, consistent principle of the committee not to amend the rules simply to restate statutory provisions. He stated the advisory committee takes the Senators' concerns seriously and has formed a subcommittee to further consider how Rule 9011 and the forms might be amended, and that the subcommittee would report on its progress at the next advisory committee meeting in September.

Judge Zilly reported that the term of Professor Alan Resnick had come to an end. He had been the advisory committee's reporter, and then a member of the committee, for more than 20 years. Judge Zilly noted that Professor Resnick has an extraordinary institutional memory and unmatched insight and wisdom that will be greatly missed by the committee. Judge Zilly also thanked the committee's current reporter, Professor Morris, its consultant on the bankruptcy forms, Patricia Ketchum, and the staff attorneys in the Administrative Office who have supported the committee with great talent and dedication – James Wannamaker and Scott Myers.

Judge Levi concluded the discussion by observing the enormity of the work and the work product of the advisory committee in implementing the comprehensive 500-plus page legislation within such a short time period.

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 attachments of June 2, 2006 (Agenda Item 12).

Amendments for Final Approval

FED. R. CIV. P. 5.2

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

STYLE PACKAGE

Judge Rosenthal explained that the final product of the style project, presented to the Standing Committee for final approval, consisted of four separate parts:

(1) the pure style amendments to the entire body of civil rules – FED. R. CIV. P. 1-86;
(2) the style-plus-substance amendments – FED. R. CIV. P. 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78;
(3) the restyled civil forms; and
(4) the restyled version of rule amendments currently pending in Congress – FED. R. CIV. P. 5.1, 24(c), and 50 – and the electronic discovery rules – FED. R. CIV. P. 16, 26, 33, 34, 37, and 45.

Judge Rosenthal reported that the advisory committee had made a few changes in the rules following publication, two of which are particularly important. First, she said, the committee expanded the note to FED. R. CIV. P. 1 to provide more information about the style project and its intentions. She noted that the committee had decided at the very start of the style project that there needed to be a brief statement somewhere in the rules or accompanying documents describing the aims and style conventions of the project. The committee concluded ultimately that the statement should be placed in an expanded note to Rule 1 identifying the drafting guidelines used and summarizing what the committee did and why. The committee note, for example, emphasizes that the style changes to the civil rules are intended to make no changes in substantive meaning. It also explains the committee's formatting changes and rule renumbering and its removal of inconsistencies, redundancies, and intensifying adjectives.

Second, the advisory committee responded to a fear expressed in some of the public comments that when the restyled rules take effect on December 1, 2007, they will

supersede any potentially conflicting provision in existing statutes. Judge Rosenthal explained that that clearly was not the intent of the committee. Moreover, she said, supersession had not proven to be a problem with the restyled appellate rules and criminal rules.

She pointed out that Professor Cooper had prepared an excellent memorandum emphasizing that the committee intended to make no change in any substantive meaning in any of the rules. The advisory committee also recommends a new FED. R. CIV. P. 86(b) that would make explicit the relationship between the style amendments and existing statutes, putting to rest any supersession concern. The proposed new rule specifies that if any provision in any rule other than new Rule 5.2 "conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007."

The committee without objection by voice vote agreed to send all the changes recommended by the style project to the Judicial Conference for final approval.

Judge Rosenthal commended Judge Levi and Judge Anthony Scirica – the current and former chairs of the Standing Committee – for their decision to go forward with restyling the civil rules after completion of the appellate and criminal rules restyling projects. She noted that an attempt had been made in the 1990's to begin restyling the civil rules, but the project had been very difficult and time-consuming. After laboring through several rules, the advisory committee decided at that time that the effort was simply too difficult and time-consuming, and it was detracting from more pressing matters on the committee's agenda. Therefore, the civil rules project had been deferred for years. She said that it took a great deal of vision, belief, and understanding of the benefits for Judges Scirica and Levi to bring it back and see it through to its successful conclusion.

Judge Rosenthal thanked the Standing Committee's Style Subcommittee – Judges Thrash and Murtha and Dean Kane – emphasizing that they had been tireless, gracious, and amazing. Also, she said, Professors Marcus and Rowe had been stalwarts of the project, researching every potential problem that arose. The project, she added, could not have been handled without the support of the Administrative Office – Peter McCabe, John Rabiej, James Ishida, Jeff Hennemuth, Jeff Barr, and Bob Deyling – who coordinated the work and kept track of 750 different documents and versions of the rules. She added that Joe Spaniol had been terrific, offering many great suggestions that the committee adopted.

Judge Rosenthal explained that it was hard to say enough about Professor Kimble's contributions. The results of the style project, she said, are a testament to his love of language. His concept was that the rules of procedure can be as literary and

eloquent as any other kind of writing. His stamina and dedication to the project, she said, had been indispensable.

Finally, she thanked Professor Cooper, explaining that he had been the point person at every stage of the project. Noting the extremely heavy volume of e-mail exchanges and memoranda during the course of the project, she emphasized that Professor Cooper had read and commented on every one of them and had been an integral part of every committee decision. His unique combination of acute attention to detail and thorough understanding of civil procedure had kept the project moving in the right direction and made the final product the remarkable contribution to the bench and bar that it will be. She predicted that within five years, lawyers will not remember that the civil rules had been phrased in any other way.

Professor Cooper added that the most important element to the success of the project, by far, had been the decision to accelerate the project and get the work done within the established time frame. The success, he said, was due to Judge Rosenthal. The project had been completed well ahead of time and turned out better than any of the participants could have hoped. Judge Murtha and Professor Kimble echoed these sentiments and expressed their personal satisfaction and pride in the results.

Informational Items

Judge Rosenthal reported that the advisory committee had approved several amendments for publication at its last meeting. The committee, though, was not asking to publish the amendments in August 2006, but would will defer them to August 2007. The bar, she said, deserves a rest. Therefore, the advisory committee was planning to come back to the Standing Committee in January 2007 with proposed amendments to FED. R. CIV. P. 13(f) and 15(a), and 48, and new Rule 62.1. The proposals, she said, were described in the agenda book.

FED. R. CIV. P. 13(f) and 15(a)

Judge Rosenthal explained that the proposed amendments to Rules 13(f) (omitted counterclaim) and 15(a) (amending as a matter of course) deal with amending pleadings. Rule 13(f) is largely redundant of Rule 15 and potentially misleading because it is stated in different terms. Under the committee's proposal, an amendment to add a counterclaim will be governed by Rule 15. The Civil Rules Style Subcommittee B, she said, had recommended deleting Rule 13(f) as redundant, but the advisory committee decided to place the matter on the substance track, rather than include it with the style package.

Judge Rosenthal reported that the advisory committee's proposal to eliminate Rule 13(f) would be included as part of a package of other changes to Rule 15. It would

also amend Rule 15(a) to make three changes in the time allowed a party to make one amendment to its pleading as a matter of course.

Professor Cooper added that the advisory committee had decided not to make suggested amendments to Rule 15(c), dealing with the relation back of amendments. The committee had not found any significant problems with the current rule in practice, notwithstanding the theoretical problems that seem to lurk in the rule's text. Moreover, the proposed changes would be very difficult to make because they raise complex issues under the Rules Enabling Act. Therefore, the committee had removed it from the agenda.

One member suggested that the proposed change to Rule 15 could take away a tactical advantage from defendants by eliminating their right to cut off the plaintiff's right to amend. The matter, he said, could be controversial. Judge Rosenthal responded that the advisory committee had thought that amendment of the pleadings by motion is routinely given. Moreover, it is often reversible error for the court not to allow an amendment. She said that the publication period will be very helpful to the committee on this issue.

FED. R. CIV. P. 48(c)

Judge Rosenthal reported that the advisory committee would propose an amendment to Rule 48 (number of jurors; verdict) to add a new subdivision (c) to govern polling of the jury. The proposal, she said, had been referred to the advisory committee by the Standing Committee. She explained that it was a simple proposal to address jury polling in the civil rules in the same way that it is treated in the criminal rules. But, she added, there is one difference between the language of the civil and criminal rules because parties in civil cases may stipulate to less than a unanimous verdict.

FED. R. CIV. P. 62.1

Judge Rosenthal reported that the advisory committee would propose a new Rule 62.1 (indicative rulings). It had been on the committee agenda for several years and would provide explicit authority in the rules for a district judge to rule on a matter that is the subject of a pending appeal. Essentially, it adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) to vacate a judgment that is pending on appeal. Almost all the circuits now allow district judges to deny post-trial motions and also to "indicate" that they would grant the motion if the matter were remanded by the court of appeals for that purpose. The proposed new rule would make the indicative-ruling authority explicit and the procedure clear and consistent.

Professor Cooper added that the advisory committee was considering publishing two versions of the indicative-ruling proposal. One alternative would provide that the court of appeals may remand if the district court indicates that it "would" grant the

motion. The other would allow the district court to indicate that it "might" grant the motion if the matter were remanded. The court of appeals, though, has to determine whether to remand or not.

One member inquired as to why the advisory committee had decided to number the new rule as Rule 62.1 and entitle it "Indicative Rulings." Professor Cooper explained that the advisory committee at first had considered drafting an amendment to Rule 60(b) because indicative rulings arise most often with post-judgment motions to vacate a judgment pending on appeal. The committee, however, ultimately decided on a rule that would apply more broadly. Therefore, it placed the proposed new rule after Rule 62, keeping it in the chapter of the rules dealing with judgments. Judge Stewart added that the Advisory Committee on Appellate Rules would like to monitor the progress of the proposed rule and might consider including a cross-reference in the appellate rules. Judge Rosenthal welcomed any suggestions and said that the committee was open to a different number and title for the rule.

FED. R. CIV. P. 30(b)(6)

Judge Rosenthal reported that the advisory committee had heard from the bar that many practical problems have arisen with regard to Rule 30(b)(6) depositions of persons designated to testify for an organization. The committee was in the process of exploring whether the problems cited could be resolved by amendments to the rules. She noted that the committee had completed a brief summary and was looking further at particular aspects in which amendments might be helpful. For example, should the rules protect against efforts to extract an organization's legal positions during a deposition? Some treatises state that if a witness testifies, the testimony binds the organization. But that is not the way the rule was intended to operate. Therefore, the advisory committee would consider whether the rule should be changed to make it clear that this is not the case. That, she said, is just one of the problems that has been cited regarding depositions of organizational witnesses.

FED. R. CIV. P. 26(a)

Judge Rosenthal said that the advisory committee was also considering whether changes were needed to the provision in Rule 26(a) (disclosures) that requires some employees to provide an expert's written report. She noted that the rule and the case law appear to differ as to the type of employee who must give an expert's report. The rule says that no report is needed unless the employee's duties include regularly giving testimony, but the case law is broader. She also noted that the ABA Litigation Section has asked the House of Delegates to approve recommendations with respect to discovery of a trial expert witness's draft reports and discovery of communications of privileged matter between an attorney and a trial expert witness. These questions also will be considered.

One of the members suggested that the advisory committee's inquiry of Rule 26(a) should be broadened to also include the problems that have arisen with regard to the testimony of treating physicians.

FED. R. CIV. P. 56

Judge Rosenthal said that a final area being considered by the advisory committee involves the related subjects of summary judgment and notice pleading. She added that the committee planned to address these issues in a leisurely way. She noted that the committee's work on restyling FED. R. CIV. P. 56 (summary judgment) was the most difficult aspect of the style project. It was a frustrating task because the rule is badly written and bears little relationship to the case law and local court rules. Since the national rule is so inadequate, she said, local court rules abound. She said that the advisory committee had decided to limit its focus to the procedures set forth in the summary judgment rule. Some of the time periods currently specified in the rule, such as leave to serve supporting affidavits the day before the hearing, are impracticable. But, she said, there was no enthusiasm in the advisory committee for addressing the substantive standard for summary judgment. That would continue be left to case law.

Related to summary judgment, she noted, is the issue of pleading standards. Much interest had been expressed over the years in reexamining the current notice pleading system. To that end, she said, the advisory committee had examined how it might structure an appropriate inquiry into both summary judgment and notice pleading. She recognized that it would certainly be difficult, and very controversial, to attempt to replace notice pleading with fact pleading. But, she said, the advisory committee had not closed the door on the subject.

As part of the inquiry, the advisory committee has considered recasting Rule 12(e) (motion for a more definite statement) and giving it greater applicability. Today, a pleading has to be virtually unintelligible before a motion for a more definite statement will be granted. The committee will consider liberalizing the standard as a way to help focus discovery.

FED. R. CIV. P. 54(d)(2), 58(c)(2)

Professor Cooper reported that the Advisory Committee on Appellate Rules had suggested that the Civil Rules Committee consider the interplay between the rules that integrate motions for attorney fees and the rules that govern time for appeal – FED. R. CIV. P. 54(d)(2) (claims for attorney's fees) and 58(c)(2) (entry of judgment, cost or fee award), and FED. R. APP. P. 4 (time to appeal). He explained that there is a narrow gap in the current rules. But, he said, the Civil Rules Committee was of the view that the matter was extremely complex, and that it was better to live with the current complexity than to amend the rules and run the risk of unintended consequences or even greater complexity.

Judge Rosenthal reported that the Advisory Committee on Civil Rules has begun to work on the time-computation project and would consider it further at its September 2006 meeting. She predicted that the committee could likely come to the conclusion that the problem of time limits set forth in statutes will not turn out to be as great in practice as in theory. The committee planned to go forward in accord with the initial schedule.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of May 20, 2006 (Agenda Item 7).

Amendments for Final Approval

FED. R. CRIM. P. 11(b)

Judge Bucklew reported that the proposed amendment to Rule 11 (pleas) was part of a package of amendments needed to bring the rule into conformity with the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which effectively made the federal sentencing guidelines advisory rather than mandatory.

She noted that Rule 11(b) specifies the matters that a judge must explain to the defendant before accepting a plea. Under the current rule, the judge must advise the defendant of the court's obligation to apply the sentencing guidelines. But, since *Booker* has made the guidelines advisory, that advice is no longer appropriate. Accordingly, the amended rule specifies that the judge must inform the defendant of the court's obligation to "calculate" the applicable range under the guidelines, as well as to consider that range, possible departures under the guidelines, and the other sentencing factors set forth in 18 U.S.C. § 3553(a).

Judge Bucklew said that the advisory committee had received comments both from the federal defenders and the U.S. Sentencing Commission. The defenders, she said, had argued that the proposed amendment would give too much prominence to the guidelines, and they suggested that the committee recast the language to require a judge to consider all the factors in 18 U.S.C. § 3553(a). The Sentencing Commission asked the committee to change the word "calculate" to "determine and calculate." The advisory committee, she said, had considered both suggestions in detail, but it decided not to make the proposed changes and agreed to send the proposed amendment forward as published.

Professor Beale added that the advisory committee had added a paragraph to the committee note pointing out that there have been court decisions stating that under certain circumstances, the court does not have to calculate the guidelines *(e.g., United*

States v. Crosby, 397 F.3d 103 (2d Cir. 2005)). She pointed out that the added language was limited and had been worked out with the Department of Justice to make sure that it is not too broad.

One member suggested, though, that the added paragraph was inconsistent with the developing case law in his circuit, which requires district judges to calculate the guidelines in every case. Other members suggested, though, that it is a waste of time for a judge to calculate the guidelines in, say, a case with a mandatory minimum sentence. Some participants suggested possible improvements to the language of the last paragraph of the note. Judge Bucklew and Professor Beale agreed to work on the language during the lunch break, and subsequently reported their conclusion that the language should be withdrawn.

The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.

FED. R. CRIM. P. 32(d) and (h)

Judge Bucklew reported that the advisory committee had proposed several changes to Rule 32 (sentence and judgment). First, it inserted the word "advisory" into the heading of Rule 32(d)(1) (presentence report) to emphasize that the sentencing guidelines are advisory rather than mandatory.

She noted that the committee had received several comments on the proposed revision of subdivision (h) (notice of intent to consider other sentencing factors) to require notice to the parties of a judge's intent to consider other sentencing factors. The current rule, she said, specifies that if the court is going to depart under the guidelines for a reason of which the parties have not been notified, the court must provide "reasonable notice" and a chance to argue. She explained that the advisory committee would expand the rule to require reasonable notice whenever the court is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence for a reason not identified either in the presentence report or a party's pre-hearing submission. She said that the advisory committee had added more specific language to the rule following the comment period, stating that the notice must specify "any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence."

Professor Beale added that there had been litigation on this matter, but the committee was of the view that non-guideline sentences should be treated the same as departures. She noted that the committee had also adopted some refinements in language suggested by the Sentencing Commission.

Judge Bucklew reported that the advisory committee had added language to Rule 32(d)(2)(F) to require the probation office to include in the presentence report any other information that the court requires, including information relevant to the sentencing factors specified in 18 U.S.C. § 3553(a). Professor Beale said that the central question is how much information the probation office must include in the presentence investigation report. As revised, the rule specifies that the report must include any other information that the court requires, including information relevant to the factors listed in § 3553(a). She noted that the probation offices in many districts already include this information in the reports. But, she added, there is quite a variance in practice, and the revised language will provide helpful guidance.

A member expressed concern about the provision requiring special notice of a non-guidelines sentence, questioning whether it would undercut the right of allocution and interfere with judicial discretion. He suggested that matters arise at an allocution that the judge should take into account and may affect the sentence. He asked whether the sentencing judge would be required to adjourn the hearing and instruct the parties to return later. He also saw a difference between the obligation to notify parties in advance that the judge is considering a departure under the guidelines and a sentence outside the guidelines.

Other members shared the same concerns and expressed the view that the language of the proposed rule might restrict the authority of a judge to impose an appropriate sentence under *Booker* and 18 U.S.C. § 3553(a). One asked what the remedy would be for a failure by the court to comply with the requirement. He added that there is also the question of whether the defendant can forfeit rights on appeal under the rule by not raising objections in the district court.

Judge Bucklew said that the case law in the area was very fluid. She noted that the advisory committee had no intention of restricting the court or requiring that any formal notice be given. Rather, she said, the focus of the committee's effort had been simply to avoid surprise to the parties. One participant emphasized that the rule uses the term "reasonable notice," which has not changed since *Booker* and has a long history of interpretation. Another participant noted that lawyers will have to look at the law of their own circuit.

One member added that the problem of surprise arises because parties normally have an expectation that the judge will impose a sentence within the guideline range. But, he added, in at least one circuit, the guidelines are now only one factor in sentencing, and the parties do not have the expectation of a guideline sentence.

Judge Hartz moved to send the proposed amendments to subdivision (h) back to the advisory committee to consider the matter anew in light of the concerns expressed and the developing case law. One member noted that the appellate court decisions on

these precise points appear to be going in different directions. Another added that the matter is very fluid, and the committee should avoid writing into the rules a standard that will change over time.

The committee with one objection approved Judge Hartz's motion to send the proposed revisions to Rule 32(h) back to the advisory committee.

The committee without objection by voice vote agreed to send the proposed amendments to Rule 32(d) to the Judicial Conference for final approval.

FED. R. CRIM. P. 32(k)

Judge Bucklew reported, by way of information, that the advisory committee had decided to withdraw the published amendment to Rule 32(k) (judgment). It would have required judges to use a standard judgment and statement of reasons form prescribed by the Judicial Conference. But, she said, a recent amendment to the USA PATRIOT Act requires judges to use the standard form. Thus, there was no longer a need for an amendment.

FED. R. CRIM. P. 35(b)

Judge Bucklew reported that the only purpose of the proposed amendment to Rule 35 (correcting or reducing a sentence) was to remove language from the current rule that seems inconsistent with *Booker*. She added that the National Association of Criminal Defense Lawyers had suggested during the comment period that any party should be allowed to bring a Rule 35 motion, not just the attorney for the government. She said that the advisory committee did not adopt the change and recommended that the rule be approved as published.

The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.

FED. R. CRIM. P. 45(c)

Judge Bucklew explained that the proposed revision of Rule 45 (computing and extending time) would bring the criminal rule into conformance with the counterpart civil rule, FED. R. CIV. P. 6(e) (additional time after certain kinds of service). It specifies how to calculate the additional three days given a party to respond when service is made on it by mail and certain other specified means.

The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.

FED. R. CRIM. P. 49.1

As noted above on page 7, the committee approved the proposed new Rule 49.1 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

Amendments for Publication

FED. R. CRIM. P. 29

Judge Bucklew reported that the proposed revision to Rule 29 (motion for judgment of acquittal) had a long and interesting history. She pointed out that the proposal had been initiated by the Department of Justice in 2003. The principal concern of the Department, she said, was that a district judge's acquittal of a defendant in the middle of a trial prevents the government from appealing the action because of the Double Jeopardy Clause of the Constitution. She explained that the Department's proposed rule would have precluded a judge in all cases from granting an acquittal before the jury returns a verdict.

Judge Bucklew noted that the advisory committee had considered the rule at two meetings, in 2003 and 2004. At the first, she said, the committee had been inclined to approve a rule in principle, and it asked the Department of Justice to provide additional information. At the second meeting, however, the committee decided that no amendment to Rule 29 was necessary.

At the January 2005 Standing Committee meeting, the Department made a presentation in favor of amending Rule 29. In doing so, it pointed to a number of cases in which district judges had granted acquittals in questionable cases. As a result, she said, the Standing Committee returned the rule to the advisory committee and asked it to: (1) draft a proposed amendment to Rule 29, and (2) recommend whether that amendment should be published.

Judge Bucklew reported that the advisory committee had considered the rule again, and it took several meetings to refine the text. The committee was in agreement on the language of the rule. But, she said, it was divided on wisdom of proceeding with the rule as a matter of policy. It recommended publication by a narrow vote of 6-5. She noted that one committee member had been absent, and his vote would have made the vote 7-5 for publication.

She emphasized that the reservations of certain members were not as to the language of the rule, but as to the policy. The objectors, she explained, were concerned that the rule would restrict the authority of trial judges to do justice in individual cases

and to further case management. She added that there also was real doubt among the advisory committee members as to the need for any amendment. They accepted the fact that there had been a few cases of abuse under the current rule, but the number of problems had been minimal.

Judge Bucklew stated that the revised Rule 29 would specify that if a court is going to grant a motion for acquittal before the jury returns a verdict, it must first inform the defendant personally and in open court of its intent. The defendant then must waive his or her double jeopardy rights and agree that the court may retry the case if the judge is reversed on appeal.

One of the participants observed that a sentence in the proposed committee note declared that the rule would apply equally to motions for judgment of acquittal made in a bench trial. Professor Beale replied that the rule did not apply to bench trials, and the sentence would be removed.

Deputy Attorney General McNulty thanked the advisory committee and the Standing Committee for considering the recommendations of the Department of Justice. He said that Department attorneys felt very strongly about the subject and wanted the committee to go forward with publication. He added that the vast majority of judges exercise their Rule 29 authority wisely and in a way that allows the government to seek judicial review. But, he said, there had been some bad exceptions that have had a large impact and had undercut the jury's ability to decide the case and the government's right to have its charging decision given appropriate deference. He said that Rule 29 presented a unique situation that needed to be addressed, and he added that it had been the policy of Congress to provide greater opportunity to the government for appellate review.

Finally, he said, the waiver approach adopted by the advisory committee with the revised rule achieves a fine balance. It gives the judge the opportunity to do justice and further case management objectives, while preserving the right of the government to appeal. He concluded by strongly urging the committee to approve publication.

One of the members objected on the grounds that the rule represents a major shift in the architecture of trials that would upset the balance in criminal trials and diminish the rights of defendants. First, he said, such a large change in criminal trials should be made by Congress through legislation, and not through rulemaking by the committee. Second, he expressed concern over the closeness of the vote in the advisory committee. The 6-5 vote, he said, was essentially a statistical tie, and the fact that the matter had been debated and deferred at so many meetings demonstrates that there are serious problems with the proposal. Third, he expressed concern that the defendant must waive his or her constitutional rights. This, he said, was unsettling. Fourth, he emphasized that he was aware of many instances in which the government overcharges, particularly by including extraneous counts and peripheral defendants. The courts, he argued, should have the

power to winnow out the extra charges and defendants, and the hands of judges should not be bound by the rule. Fifth, he said that it is unfair for defendants to have a "sword of Damocles" hanging over their heads for two or three years, while the government appeals the trial judge's decision to acquit. Finally, he summarized, the rule was sure to lead to unintended consequences, and the changes the government wants should not be made through the rules process.

Several members of the committee expressed sympathy for these views, but they nevertheless announced that they favored publication of the rule.

Judge Levi added some background on the history of the rules. He noted that it had been on the agenda for some time, and it had been approved originally by the advisory committee with considerable support, perhaps by an 8-4 vote. Then, however, at the next meeting the committee changed its mind.

Initially, he explained, the proposal of the Department of Justice had been to prevent a judge from entering a pre-verdict of acquittal in any circumstances. But the district judges on the advisory committee asked how they would be able to deal with problems arising from excess defendants, excess counts, and hung juries.

The waiver proposal, he said, had been developed to address these competing concerns. It would preserve the discretion of the district judges and help them manage their cases. Yet it would give the government the right to appeal a district judge's pre-verdict acquittal. Nevertheless, he pointed out, the advisory committee rejected the waiver proposal and decided that no change was needed in the rule.

At the January 2005 Standing Committee meeting, Associate Deputy Attorney General Christopher Wray made strong arguments in support of the proposed rule amendment that included the waiver procedure. Judge Levi said that the Department had been very persuasive, and the Standing Committee took a strong position and directed the advisory committee to draft a proposed amendment. Then, he said, the Department went back to the advisory committee and made the argument for the proposed amendment, which the committee approved on a 6-5 vote.

Judge Levi said that he would prefer to handle the proposal through the rulemaking process, rather than have the Department go to Congress for legislation.

One member expressed concerns over the proposal, but said that he had been convinced to support publication because the rule was supported by Robert Fiske, a distinguished member of the advisory committee who had served as both a prosecutor and defense lawyer. He added that while the number of abuses is very small, the cases in which abuse has occurred under Rule 29 have tended to be prominent.

He added that the rules do in fact affect the architecture of trials. The waiver proposal, he said, may be unique, but it is an innovative attempt to assist judges in managing cases and addressing overcharging by prosecutors. He added that it was important to foster dialogue between the judiciary and the Department of Justice and to solicit the views of the bench and bar on the proposal. To date, he said, the proposal had been debated only by the members of the committees, but not by the larger legal community. Publication, he said, would be very beneficial.

Another member said that the proposed rule is a very nice solution to the problem. He said that it can be a travesty of justice when a judge makes a mistake under the current rule. The right of a judge to grant an acquittal remains in the rule, but it is subject to further judicial scrutiny.

One member asked whether there were other rules that require defendants to waive their constitutional rights. One member suggested that an analogy might be made to conditional pleas under FED. R. CRIM. P. 11(a)(2). Professor Capra added that FED. R. CRIM. P. 7 provides for waiver of indictment by the defendant, and FED. R. CRIM. P. 16 (discovery and inspection) contains waiver principles when the defendant asks for information from the government. Both require a defendant to waive constitutional rights in order to take advantage of the rule.

Judge Levi pointed out that the committee could withdraw the rule after the public comment period, and it had done so with other proposals in the past. But, he said, as a matter of policy, the committee should not publish a proposal for public comment unless it has serious backing by the rules committees.

One member expressed concern that if the rule were published, it might lead the public to believe that it enjoyed the unanimous support of the committee. Judge Levi responded that the committee does not disclose its vote in the publication because it wants the public to know that it has an open mind. Mr. Rabiej explained that the publication is accompanied by boilerplate language that tells the public that the published rule does not necessarily reflect the committee's final position. He added that the report of the advisory committee is also included in the publication, and it normally alerts the public that a proposal is controversial.

The Deputy Attorney General stated that the Department of Justice wanted to have its points included in the record to continue the momentum into the next stage of the rules process. He said that he had been surprised over the arguments that the proposed change should be made by legislation, rather than through the rules process. He pointed out that he had worked as counsel for the House Judiciary Committee for eight years and had heard consistently from the courts that the rulemaking process should be respected. He said that it was in the best interest of all for the proposal to proceed through the rulemaking process, rather than have the Department seek legislation. He noted that

while there had only been a few cases of abuse by district judges, those few tended to occur in alarming situations and could be cited by the Department if it were to seek legislation.

He said that the Department had worked for several years on the proposal with the committees through the rulemaking process and would like to continue on that route. The proposal, he said, had substantial merit and should be published.

He added that the Department disagreed with the characterization that the proposed amendment would alter the playing field. Rather, he said, it would preserve the right to present evidence and to have the court's ruling on acquittal preserved for appellate review. A pre-verdict judgment of acquittal, he emphasized, stands out from all other actions and is inconsistent with the way that other matters are handled in the courts. He pointed out, too, that the Department was deeply concerned about the dismissal of entire cases without appellate review. On the other hand, it was not as concerned with a court dismissing tangential charges. He concluded that the Department would do all it could to work toward a balanced solution to a very difficult problem. The waiver proposal, he said, is a good approach. It is a good compromise and offered a balanced solution to the competing interests. He said that the Department appreciated the opportunity to come back to the committee.

One member suggested deleting the word "even" from line 20 in Rule 29(a)(2). It was pointed out that the word had been inserted as part of the style process. Judge Levi suggested that Style Subcommittee take a second look at the wording as part of the public comment process.

The committee, with one dissenting vote, approved the proposed rule for publication by voice vote.

FED. R. CRIM. P. 41(b)(5)

Judge Bucklew reported that the proposed amendment to Rule 41(b)(search warrants) would authorize a magistrate judge to issue a search warrant for property located in a territory, possession, or commonwealth of the United States that lies outside any federal judicial district. Currently, a magistrate judge is not authorized to issue a search warrant outside his or her own district except in terrorism cases..

She noted that the Department of Justice had raised its concern about the gap in authority at the last meeting of the advisory committee. The Department had asked the committee to proceed quickly because of concerns over the illegal sales of visas and like documents. It felt constrained because overseas search warrants could not be issued in the districts where the investigations were taking place. She explained that the proposed amendment to Rule 41(b)(5) would allow an overseas warrant to be issued by a

magistrate judge having authority in the district where the investigation is taking place, or by a magistrate judge in the District of Columbia. The advisory committee, she added, had voted 10-1 to publish the rule.

Judge Bucklew advised the committee of developments that had occurred since the vote. She noted that at Judge Levi's suggestion, Mr. Rabiej had sent the proposal to Judge Clifford Wallace, who chairs the Ninth Circuit's Pacific Islands Committee. In turn, Judge Wallace contacted the Chief Justice of American Samoa, who objected to the proposed amendment. Judge Wallace suggested that the proposal be remanded back to the advisory committee in order to give American Samoa a chance to respond. She added that she was not sure exactly what American Samoa's concerns were, but it appeared that the Chief Justice did not want judges in other parts of the country issuing warrants for execution in American Samoa.

Judge Bucklew reported that after speaking with Judge Wallace, the Administrative Office had polled the advisory committee as to whether it should wait until the Chief Justice of American Samoa and the Pacific Islands Committee of the Ninth Circuit respond. Accordingly, it voted 9-2 to allow time for a response. She noted that the Department of Justice representative objected, along with one other advisory committee member. She added that later discussions have suggested that the proposal could still be published, with American Samoa and the Pacific Islands Committee commenting during the public comment period.

She pointed out that after the advisory committee meeting, the House of Representatives passed a bill containing a provision similar to the proposal to amend Rule 41(b). Basically, it would allow investigation of possible fraud and corruption by officers and employees of the United States in possible illegal sales of passports, visas, and other documents. It would authorize the district court in the District of Columbia to issue search warrants for property located within the territorial and maritime jurisdiction of the United States. She added that she was not sure what the Department's position would be on the bill, and she noted that the legislation probably did not cover everything in the proposed rule amendment.

Professor Beale said that the Department of Justice's largest concern was with visa fraud. This, in turn, was connected with larger issues of illegal immigration and terrorism. In addition, the question arose whether the committee would have to republish the current proposal if its reference to a territory of the United States were deleted following the public comment period. She concluded that republication would probably not be required. She explained that subdivision (a) of the rule, which refers to territories, was not connected to subdivisions (b) and (c), which authorize search warrants for property in diplomatic or consular missions and residences of diplomatic personnel. She said that the committee could place brackets around subdivision (a) and invite comment from American Samoa and others as to whether subdivision (a) should be included.

Judge Bucklew also pointed out, as mentioned in the advisory committee's report, that a similar, but broader proposal had been approved by the Judicial Conference but rejected by the Supreme Court in 1990.

Judge Levi suggested bracketing the language regarding American Samoa. He noted from speaking with Judge Wallace that there is a great deal of sensitivity in American Samoa about any intrusion into its judicial process. He noted that the situation is very different from the other Pacific Islands territories, such as Guam and the Northern Marianas, both of which have Article I federal district courts. The history of how the United States acquired American Samoa is different from that of other territories, and the relevant treaty explicitly requires the United States to respect the judicial culture of American Samoa. He noted, too, that there had been a proposal to establish an Article I federal court in American Samoa, but it has been very controversial.

Judge Levi also pointed out that Judge Wallace warned that if the proposal to amend Rule 41 is published without bracketing American Samoa, there could be a good deal of needless controversy generated. The primary concern of the Department of Justice, he said, is with oversees searches, and not with American Samoa. He asked whether the advisory committee would be amenable to bracketing the language dealing with American Samoa.

Judge Bucklew responded that the advisory committee would certainly approve placing brackets around the provision to flag it for readers. She said that the proposed amendments to Rule 41 were very beneficial, and it would be a shame not to have them proceed because of a controversy over a matter of relatively minor concern to the government.

The committee unanimously approved the proposed amendment, with the pertinent language of subsection (A) bracketed, for publication by voice vote.

MODEL FORM 9 ACCOMPANYING THE SECTION 2254 RULES

Mr. Rabiej stated that the committee needed to abrogate Form 9 accompanying the § 2254 rules. He noted that the form is illustrative and implements Rule 9 of the § 2254 rules (second or successive petitions). The form, however, was badly out of date, even before the habeas rules were restyled, effective December 1, 2004. For example, it contains references to subdivisions in Rule 9 that no longer exist and includes provisions that have been superseded by the Antiterrorism and Effective Death Penalty Act of 1996.

He added that when the restyled habeas corpus rules had been published for comment in August 2002, the advisory committee received comments from district judges recommending that the form not be continued because the courts relied instead on local forms. The courts wanted to retain flexibility to adapt their forms to local

conditions instead of following a national form. The advisory committee and its habeas corpus subcommittee did not specifically address abrogation of the form. Thus, technically Form 9 still remains on the books. He added that the form had been causing some confusion, and the legal publishing companies no longer include it in their publications. In addition, Congressional law revision counsel thought that the form had been abrogated and no longer included it in their official documents. Therefore, Mr. Rabiej said, it would be best for the committee to officially abrogate the form through the regular rulemaking process. *i.e.*, approval by the committee and forwarding to the Supreme Court and Congress.

The committee without objection by voice vote agreed to ask the Judicial Conference to abrogate Form 9 accompanying the § 2254 Rules.

Informational Items

Judge Bucklew reported that the advisory committee was still working on a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection), which would expand the government's obligation to disclose exculpatory and impeaching information to the defendant. She said that the matter was controversial, and the Department of Justice was strongly opposed to any rule amendment. Instead, she said, it had offered to draft amendments to the *United States Attorneys' Manual* as a substitute for an amendment. The matter, she added, was still in negotiation. Deputy Attorney General McNulty and Assistant Attorney General Fisher said that the Department was still working on the manual and was hopeful of making progress.

Judge Bucklew said that the committee was also considering a possible amendment to FED. R. CRIM. P. 41 (search warrants) that would address search warrants for computerized and digital data. It was also looking at possible amendments to the § 2254 rules and § 2255 rules to restrict the use of ancient writs and prescribe the time for motions for reconsideration.

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 May 15, 2006 (Agenda Item 8).

New Rule for Publication

FED. R. EVID. 502

Judge Smith reported that the advisory committee had only one action item to present — proposed new FED. R. EVID. 502 to govern waiver of attorney-client privilege and work product protection. He referred back to the report of the Administrative Office and Mr. Rabiej's description of the exchange between Judge Levi and the chairman of the House Judiciary Committee. He noted that the committee had received a specific request from Chairman Sensenbrenner to draft a rule that would:

1. protect against inadvertent waiver of privilege and protection,

2. permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and

3. allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in subsequent proceedings.

He explained that rules that affect privilege must be addressed by Congress and enacted by legislation. Thus, the rules committees could produce a rule through the Rules Enabling Act process that would then be enacted into law by Congress.

Judge Smith noted that the advisory committee had conducted a very profitable conference at Fordham Law School in New York at which 12 invited witnesses commented on a proposed draft of the rule. He said that the committee had refined the rule substantially as a result of the conference, and the improved product was ready for approval by the Standing Committee to publish. He explained that the rule incorporated the following basic principles agreed upon unanimously by the advisory committee:

1. A subject-matter waiver should be found only when privileged material or work product has already been disclosed and a further disclosure "ought in fairness" to be required.

2. There should be no waiver if there is an inadvertent disclosure and the holder of the protection takes reasonable precautions to prevent disclosure and reasonably prompt measures to rectify the error.

3. Selective waiver should be allowed.

4. Parties should be able to get an order from a court to protect against waiver vis a vis non-parties in both federal and state courts.

5. Parties should be able to contract around the common-law waiver rules. But without a court order, their agreement should not bind non-parties.

Judge Smith pointed out that the rule included some controversial matters, but it was needed badly to control excessive discovery costs. He said that the burdens and cost of preserving the privileged status of attorney-client information and trial preparation materials had gotten out of hand without deriving any countervailing benefits.

Judge Smith pointed out that selective waiver was the most controversial provision in the rule. It would protect a party making a disclosure to a government law enforcement or regulatory agency from having that disclosure operate as a waiver of the privilege or protection vis a vis non-governmental persons or entities. He explained that the advisory committee would place the provision in brackets when the rule is published and state that the committee had not made a final decision to include it in the rule.

Professor Capra agreed that the most controversial aspect of the rule was the selective waiver provision. He pointed out that the proposed rule takes a position inconsistent with most current case law. He emphasized that the advisory committee had not decided to promulgate that part of the rule, so the provision is set forth in brackets. In addition, the accompanying letter to the public states that the committee had not made a decision to proceed and wanted comments directed to the advisability of including a selective waiver provision. Judge Levi added that Chairman Sensenbrenner had specifically asked the committee to include a selective waiver provision in the rule.

Professor Capra explained that the original version of the rule had a greater effect on state court activity and sought to control state law and state rules on waiver. But the Federal-State Jurisdiction Committee of the Judicial Conference – and the advisory committee itself after its hearing in New York – concluded that the draft was too broad. Accordingly, it was amended and now covers only activity occurring in a federal court.

Judge Levi noted that the representative of an American Bar Association's Task Force on the Attorney-Client Privilege opposed the rule at the New York conference because he said that it would foster the "coercive culture of waiver." The task force, he explained, is concerned that waivers are being extorted by government agencies from businesses as part of the regulatory and law enforcement processes.

Judge Levi added that he had spoken to the chair of the task force and emphasized that the committee was not trying to encourage the use of waivers. Nor was it taking a position on Department of Justice memoranda to U.S. attorneys encouraging them to weigh a corporations's willingness to waive the attorney-client privilege in assessing its level of cooperation for sentencing purposes. Rather, he emphasized, the rules committee was just trying to promote the public interest by facilitating the conduct of government investigations into public wrongs. Judge Levi added that, in response to the concerns of the ABA task force, the committee should include a statement in the publication to the effect that the committee was not taking a position regarding the government's requests for waivers. The addition, he said, could avoid misdirected criticism of the rule.

Associate Attorney General McCallum agreed that the explanation would be helpful to the organized corporate bar. He said that the Department had been surprised by the feedback at the Fordham conference, where some participants had voiced strong opposition to the proposal on the ground that it would foster a culture of waiver. He said that the Department supported the pending new Rule 502 and would continue to work with the organized bar over their concerns.

One member questioned the effect of the proposal on state court proceedings. He asked whether the advisory committee had examined the power of Congress under the Commerce Clause of the Constitution to effect changes in the rules of evidence in the state courts. Professor Capra responded that the committee had indeed examined the issue and had invited an expert to testify on it at the mini-conference. In addition, he said, Professor Kenneth Broun, a consultant to the committee and a former member of the committee, had also completed a good deal of research on the issue. He said that the proposed rule dealt only with the effect on state court proceedings of disclosures made in the federal courts. It did not address the more questionable proposition of whether the rule could control disclosures made in state court proceedings. The literature, he said, suggests that Congress has the power to regulate even those disclosures. But, he said, the advisory committee narrowed the rule to cover only disclosure at the federal level.

One member asked whether the Department of Justice favored selective waiver in order to promote law enforcement and regulatory enforcement efforts. He noted that he had sat on a case in which the panel of the court of appeals had asked the Department to file an amicus curiae brief on the issue, but had received none. He said that the panel had been frustrated by the uncertainty regarding the Department's views on the issue. Associate Attorney General McCallum pointed out that the Department acts as both plaintiff and defendant and that some components of the Department strongly favor selective waiver. He noted, by way of example, that the prosecutions in the Enron case would have been more difficult and time-consuming if waivers had not been given. The waivers, he emphasized, had been voluntarily given with the advice of counsel. He explained that the Department favors selective waiver, but had not yet taken an official position on the matter.

Judge Levi explained that the purpose of selective waiver is to encourage companies to cooperate in regulatory enforcement proceedings. He said that the Securities and Exchange Commission favored the proposed Rule 502, and it would be very helpful to obtain the views of other law enforcement and regulatory authorities in order to develop the record for the advisory committee. Professor Capra added that the strong weight of authority among the circuits, as expressed in the case law, was against selective waiver. Therefore, he said, there needed to be a strong showing in favor of it during the public comment period. Judge Levi concurred and added that a strong case also needs to be made by the state attorneys general and other regulatory authorities.

The committee unanimously approved the new rule for publication by voice vote.

Informational Items

Professor Capra reported that the advisory committee had been monitoring the developing case law on testimonial hearsay following *Crawford v. Washington*, 541 U.S. 36 (2004). He noted that the Supreme Court had just issued some opinions dealing with *Crawford*, but the issues in the cases were relatively narrow and do not provide sufficient guidance on how to treat hearsay exceptions in the federal rules. The advisory committee, he said, would continue to monitor developments, and it wanted to avoid drafting rules that later could become constitutionally questionable.

Professor Capra also reported that the advisory committee was considering restyling the Federal Rules of Evidence, mainly to conform the rules to the electronic age and to account for information in electronic form. He noted that the committee had had discussions on how to address the matter, and it had considered the possibility of restyling the entire body of evidence rules. He added that he planned to work with Professor Kimble to restyle a few rules for the committee to consider at its next meeting. Finally, he noted, the view of the Standing Committee on whether to restyle the evidence rules will be very important.

Professor Capra reported that draft legislation was being considered in Congress that would establish a privilege for journalists. The legislative activity, he said, stemmed in part from the controversies surrounding the celebrated cases involving the imprisonment of New York Times reporter Judith Miller and the leak of the identity of C.I.A. employee Valerie Plame. He explained that the Administrative Office had reviewed the proposed legislation and offered some suggestions on how its language could be clarified. Mr. Rabiej added that many of the suggestions had been adopted by the Congressional drafters.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of January 20, 2006 (Agenda Item 9).

Judge Kravitz reported that the advisory committees at their Spring 2006 meetings had embraced the time-computation template developed by the subcommittee, including its key feature of counting all days and not excluding weekends and holidays.

He pointed out that the Standing Committee at its January 2006 meeting had asked the subcommittee and the advisory committees specifically to address two issues:

(1) the inaccessibility of a clerk's office to receive filings; and (2) whether to retain the provision that gives a responding party an additional three days to act when service is made it by mail or by certain other means, including electronic means. He noted that the advisory committees had decided that the issue of inaccessibility needed additional study, and the subcommittee was willing to take on the task. Professor Capra added that the Technology Subcommittee had already considered these issues as part of its participation in the project to develop model local rules to implement electronic filing.

As for the "three-day rule," Judge Kravitz reported that the sense of the advisory committees was to leave the rule in place without change at this time. He said that it seemed odd to give parties an extra three days when they have been served by electronic means, but many filings are now made electronically over weekends and the committees were concerned about potential gamesmanship by attorneys. The general inclination has been not to amend the rule at this point.

Judge Kravitz said that the Advisory Committee on Civil Rules had suggested some helpful improvements to the template. First, he noted, the language of the template speaks in terms of filing a "paper." But in the electronic age, he said, it makes sense to eliminate the word "paper."

Second, he pointed out that the template speaks in terms of a day in which "weather or other conditions" make the clerk's office inaccessible. He said that the advisory committee was concerned about the specific reference to "weather" because it implies that only physical conditions may be considered. Instead, the language might be improved by simply referring to a day on which the clerk's office "is inaccessible." The committee note could explain, though, that elimination of the word "weather" is not intended to remove weather as a condition of inaccessibility.

Third, the advisory committee suggested deleting state holidays as days to exclude in computing deadlines. Most federal courts, he said, are in fact open on state holidays. He noted that the subcommittee had not decided to make this change, but would be amenable to doing so if the Standing Committee expressed support for the change.

Fourth, he said that the advisory committee had noted that "virtual holidays" were not included in the template, *e.g.*, the Friday after Thanksgiving and the Monday before a national holiday that falls on a Tuesday. Some federal courts, he said, are effectively closed on those days, although their servers are available to accept electronic filings.

Fifth, he said that the advisory committee had suggested including a definition of the term "last day" in the text of the rule. He reported that Professor Cooper had drafted a potential definition, drawing on the text of local court rules implementing electronic filings. It states that, for purposes of electronic filing, the "last day" is midnight in the

time zone where the court is located. For other types of filings, it is the normal business hours of the clerk's office, or such other time as the court orders or permits.

Judge Kravitz explained that the civil, bankruptcy, and appellate rules – unlike the criminal rules – apply in calculating statutory deadlines as well as rules deadlines. He pointed out that Professor Struve had completed an excellent memorandum on the subject in which she identified many important statutory deadlines. Her initial study had found more than 100 statutory deadlines of 10 days or fewer. Many of them, he added, are found in bankruptcy. Moreover, some apply not to lawyers, but to judges. Under the current rules, he said, a deadline of 10 days usually means 14 days or more because weekends and holidays are not counted. But under the approach adopted in the template, 10 days will mean exactly 10 days.

Judge Kravitz reported that the Advisory Committee on Civil Rules had suggested that the advisory committees should consider expressing all, or most, time periods in multiples of seven days. The concept, he noted, seems generally acceptable but may not work well across-the-board for all deadlines. It may be, he said, that deadlines below 30 days would normally be expressed in multiples of seven, but the longer periods now specified in the rules, such as 30, 60, or 90 days might be retained.

Finally, Judge Kravitz thanked Judge Patrick Schiltz, former reporter for the appellate rules committee and special reporter for the time-computation project, for his superb research and memoranda and for drafting the template and supporting materials that got the project moving. He also thanked Professor Struve for picking up the work from Judge Schiltz and for her excellent memorandum on statutory deadlines. He also praised the advisory committees for their dedication to the project and their invaluable help to the subcommittee.

Professor Struve highlighted the backward-counting provision in the template rule and wondered about its practical effect. Judge Kravitz explained that the subcommittee had wanted a simple rule. He acknowledged that there are scenarios under the template in which litigants may lose a day or two in filing a document, and judges would gain a day or two. But, he said, even though the subcommittee consisted mostly of practicing attorneys, all endorsed the basic principle – in the interest of simplicity – that once one starts counting backward, the count should continue in the same direction.

Professor Cooper added that the bar for years had urged the Advisory Committee on Civil Rules to make the rules as clear as possible, and one attorney recently had asked the committee to draft a clear rule telling users how to count backwards, *e.g.,* to calculate a deadline when a party has to act a certain number of days *before* an event, such as a hearing. To that end, he said, it might be advisable to put back into the template the words "continuing in the same direction," which had been dropped from an earlier draft in the interest of simplicity. Including those words would make it

clear that backward counting follows the same pattern as forward counting. A member of the committee strongly urged including the clarifying language in the rule.

Judge Kravitz said that the most difficult issue appeared to be the applicability of the rule to statutory deadlines. A few statutes, he said, speak specifically in terms of calendar days. But when statutes do not specify calendar days, it can be assumed that only business days are counted under the current rule when a deadline is 10 days or fewer. He pointed out that the practical impact of the template rule would be to shorten statutory deadlines of 10 days or fewer. That result, he said, might undercut the bar's acceptance of the time-computation project.

Professor Morris added that the template rule would have a substantial impact on bankruptcy practice because a great many state statutes are in play in bankruptcy cases. Under the current bankruptcy rule, he said, the statutes are calculated by counting only business days.

Professor Morris also noted that the proposed template rule speaks of inaccessibility in such a way that it could be interpreted to include inaccessibility on a lawyers' end, as well as the inaccessibility of the clerk's office to accept filings. He suggested that the rule might be broad enough to cover the situation where a law firm's server is not working.

Judge Rosenthal explained that the civil advisory committee had considered that situation and had decided tentatively that it was not possible to write a rule to cover all situations. She suggested that it should be left up to the lawyers to decide whether they need to ask a court for an extension of time in appropriate situations. She cautioned, however, that there are a handful of time limits in the rules that a court has no authority to extend.

One participant urged that the time had come to move forward with the time-computation project, despite the complications posed by statutory deadlines. He suggested, moreover, that Congress might well be amenable to making appropriate statutory adjustments in this area to accommodate the time-computation project, especially if the bar associations agree with the committee's proposal.

Judge Levi asked whether the subcommittee was contemplating further changes or additions to the template. Judge Kravitz responded that at least three changes should be made. First, he said the subcommittee would eliminate the word "paper." Second, he said that he had been persuaded to eliminate the word "weather," so the rule would state simply that the last day is not counted if the clerk's office is "inaccessible." Third, he agreed to add to the rule a definition of "last day" along the lines of Professor Cooper's proposal. That definition, he noted, is workable and already exists in most of the local court rules dealing with electronic filing.

In addition to those three changes, Judge Kravitz said that he had no objection to eliminating state holidays from the rule if there were support for the change. As for closure of the federal court on a "virtual holiday," he said that the problem would be taken care of by revising the rule to specify that the last day is not counted if the clerk's office is inaccessible. Several members of the committee suggested that both state holidays and virtual holidays be eliminated from the rule. Thus, the only exclusions in the rule would be for federal holidays and days when the clerk's office is "inaccessible." Another member added that it should be made clear in the rule that "inaccessibility" applies only to problems arising at the courthouse, and not in a lawyer's office.

Judge Kravitz noted that the instructions from the Standing Committee were for the advisory committees to review individually each of the individual time limits in their respective rules and to recommend appropriate adjustments to them in light of the template's mandate to count all days, including weekends and holidays.

One participant suggested that the only significant issue relating to statutes was the problem that the proposed rule would shorten statutory deadlines of 10 days or fewer. Another participant pointed out, though, that the supersession provision of the Rules Enabling Act might also be implicated.

One advisory committee chair suggested that it would be very helpful for the advisory committees to have a list of all the various statutory deadlines and an indication of how often they actually arise in daily situations. Some of the statutes, she said, might make a big difference in federal practice, such as the 10 days given a party by statute to object to a magistrate judge's report.

One member said that the problem of shortening statutory deadlines had the potentiality of undermining the whole time-computation project and wasting a great deal of time and work by the advisory committees.

Another added that it was questionable whether judges have authority to extend statutory deadlines. He suggested that it might be appropriate to speak with members of Congress about the issue. Another participant said that Congress might give its blessing to fine tuning the calculation of statutory deadlines, as long as the particular deadlines affected are not politically charged.

Professor Struve added that she had just scratched the surface with her initial research into statutory deadlines. She said that it would be a truly major project to gather all the statutes, and the committee was bound to make a mistake or two. Professor Cooper pointed out that, unless the new rule also sweeps up all future statutes, some time periods could end up being counted one way and others another way – the worst possible outcome.

One member asked whether lawyers in fact even look to the federal rules to calculate a deadline in a statute. Or do they merely look to the statute itself? In other words, if a statutory deadline is 10 days, do lawyers assume that it means 10 days, as set forth in the plain language of statute itself, or 14 days, as calculated under the federal rules?

Judge Kravitz suggested that the choice for the advisory committees was either: (1) to continue their examination of each time limit in their respective rules, or (2) to try to solve the statutory deadline problems first, present a solution to those problems at the January 2007 Standing Committee meeting, and then resume work on the specific time limits. One advisory committee chair said that it was important to have a firm road map in place before the advisory committees commit themselves to a great deal of work.

One participant concluded that the committees may not be able to resolve all the open questions regarding statutory interpretation and the interplay between statutes and rules. Professor Cooper pointed out that supersession questions already make it unclear in several instances whether a statute or a related rule should control the computation of a given time limit. Many of those questions have never been faced and answered. In the interest of simplicity, though, he suggested that it may make sense simply to abolish the 11-day rule explicitly for both rules and statutes, even if that results in certain statutory time limits being shortened.

Two members suggested that another possible resolution of the statutory problems would be to eliminate all reference in the rule to calculating time limits set forth in statutes. Therefore, the rules, as revised, would apply only in calculating time limits set forth in rules and court orders. Another member pointed out that this solution would bring the civil and bankruptcy rules into line with the current criminal rules, which do not extend to calculation of statutory time limits.

One advisory committee chair suggested that there was great value in continuing the momentum that the Technology Subcommittee had created. She said that the civil advisory committee had made a good deal of progress, and it would be best to continue its work over the summer, despite the uncertainties over statutes.

Another advisory committee chair pointed out that there is a difference between counting hours and counting days. Under the rules, he explained, days are considered as units, not 24-hour periods. Therefore, a party has until the end of the last day in which to act. On the other hand, in counting hours, an hour counts as exactly 60 minutes, not as a unit. Therefore, a party has exactly 60 minutes in which to act. The time period is not rounded up to the end of the last hour. He suggested that the committee consider specifying in the template that 60 minutes is 60 minutes precisely.

One participant recommended that the committee consider whether Congress contemplates that its statutes will be interpreted according to the time-computation provisions in the federal rules. He suggested that the committee, by changing the method of calculating shorter statutory deadlines, might be contradicting the intentions of Congress in enacting the statutes.

Judge Kravitz added that the rule should provide clear advice to judges and lawyers on how to count time limits set forth in statutes. The proposed revision of the federal rules would effectively shorten the time for people to act. Therefore, he said, the committee should study such matters as how judges and lawyers actually count time in statutes, how many statutory deadlines there are, how often they arise in the courts, and whether they have caused practical problems. Once the committees understand these issues better, they should be able to propose the appropriate solution to the problem of counting time as set forth in statutes.

One member emphasized that the bar wants a clear, revised rule, and the time has come to promulgate it. Among other things, he said, lawyers are deeply concerned about achieving clarity because missing a deadline is a serious mistake that can lead to a malpractice claim. He suggested, among other things, that the committee expressly solicit the views of the bar regarding statutory deadlines or hold a conference with members of the bar on the subject.

Judge Levi suggested that each advisory committee decide how it should proceed on the matter in light of the discussion. Judge Stewart added that the template, with the various adjustments suggested at the meeting, provides the appropriate vehicle for the advisory committees.

LONG RANGE PLANNING

Mr. Ishida reported that the Judicial Conference's Long Range Planning Group, comprised of the chairs of the Conference's committees, had met in March 2006, and its report was included in the agenda book (Agenda Item 10). The group, he said, was preparing the agenda for its next meeting and had asked the chairs of each committee to submit suggested topics.

The planning group first asked the Standing Committee to identify key strategic issues affecting the rulemaking process and to report on what initiatives or actions it was taking to address those issues. Second, the planning group asked the committee to identify trends in the courts that merit further study and could lead to new rules. Mr. Ishida asked the members to consider these requests and send him any ideas that could be included in the committee's report to the planning group.

Mr. McCabe suggested that it would be very helpful for the committee to take advantage of the new statistical system being built by the Administrative Office. He said that the committee should consider the kinds of data that might be extracted from court docket events to develop a sound empirical basis for future rules amendments. Judge Levi endorsed the Administrative Office's efforts to improve and expand collection of statistical information from the courts.

One member suggested that the committee might also consider pro se cases as an area that needed to be addressed in future rulemaking.

Judge Levi agreed to work with Mr. Ishida on a response from the committee to the long range planning group.

NEXT COMMITTEE MEETING

The next committee meeting of the committee will be held in Phoenix in January 2007. The exact date of the meeting was deferred to give the chair and members an opportunity to check their calendars and for the staff to explore the availability of accommodations.

Respectfully submitted,

Peter G. McCabe,
Secretary