COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 10-11, 2002
Tucson, Arizona
Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Tucson, Arizona, on Thursday and Friday, January 10-11, 2002. The following members were present:

Judge Anthony J. Scirica, Chair
Judge Frank W. Bullock, Jr.
Charles J. Cooper
Judge Sidney A. Fitzwater
Dean Mary Kay Kane
Mark R. Kravitz
Patrick F. McCartan
Judge J. Garvan Murtha
Judge A. Wallace Tashima
Judge Thomas W. Thrash, Jr.
Deputy Attorney General Larry D. Thompson
Chief Justice Charles Talley Wells

Judge Michael Boudin and David M. Bernick were unable to attend the meeting.

Also participating in the meeting were four former members of the committee – Judge Alicemarie H. Stotler, Professor Geoffrey C. Hazard, Jr., Gene W. Lafitte, and Sol Schreiber — and four former advisory committee chairs — Judges Paul V. Niemeyer, Patrick E. Higginbotham, Will L. Garwood, and Fern M. Smith.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the U.S. Courts; James N. Ishida, special counsel in the Office of Judges Programs of the Administrative Office; and Christopher F. Jennings, law clerk to Judge Scirica.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Richard H. Kyle
(substituting for Judge David F. Levi, Chair)
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were: Joseph F. Spaniol, Jr., consultant to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Joe Cecil of the Research Division of the Federal Judicial Center. Professor R. Joseph Kimble, consultant to the committee, participated in part of the meeting by telephone.

INTRODUCTORY REMARKS

Judge Scirica introduced the new members of the committee: Chief Justice Wells, Deputy Attorney General Thompson, and Mr. Kravitz. He also thanked Judge Garwood and Mr. Lafitte, whose terms had expired, for their distinguished service to the committee and presented them with framed certificates signed by the Chief Justice. Judge Scirica pointed to Judge Garwood's highly successful chairmanship of the Advisory Committee on Appellate Rules over the last four years and his major role in restyling the appellate rules. He praised Mr. Lafitte for six years of outstanding service on the Standing Committee and his innovative leadership as chair of the Technology Subcommittee.

Judge Scirica reported that the Judicial Conference had just opened its fall meeting at the Supreme Court on September 11, 2001, when the tragic events of that day interrupted the proceedings before any official actions could be taken. He elaborated on three rules items on the September 2001 Conference agenda.

First, Judge Scirica said that he had withdrawn the proposed revisions of Bankruptcy Rule 2014, after discussion with Judge Small, when two members of the Conference's Executive Committee expressed serious reservations about them, and Conference approval of the proposals appeared to be in doubt. The withdrawn amendments would have relaxed the scope of the current requirement in Rule 2014 that a professional seeking appointment disclose to the court all connections with creditors, their attorneys, and their accountants. Judge Scirica noted that the proposal had been returned to the Advisory Committee on Bankruptcy Rules for further consideration.

Second, Judge Scirica noted that the proposed changes in the criminal rules — including both the restyling of the rules and substantive amendments — are uncontroversial. They had been placed on the Conference's consent calendar, with the exception of the video conferencing proposals, and were later approved routinely by mail ballot after the interrupted Conference meeting.

Third, Judge Scirica reported that controversy had arisen over the proposed amendments to Criminal Rules 5 and 10, which would allow a judge to conduct an initial appearance or arraignment by video conferencing upon the consent of the defendant. He pointed out that the Department of Justice strongly supports the proposal, but would prefer to have it authorize video conferencing even without the defendant's consent. On the other hand, federal defenders and the Defender Services Committee oppose video conferencing of criminal proceedings — even with consent — on the grounds that it would shift costs from the Department of Justice to the defenders' appropriation and potentially undermine the solemnity and dignity of the proceedings.

Judge Scirica reported that video conferencing is used widely in the state courts, pointing to a survey of state defenders showing general satisfaction as long as the proceedings are conducted in adequate facilities, the technology is excellent, and the defendants are able to speak with their lawyers. He added that the Advisory Committee on Criminal Rules was split on the issue of requiring the defendant's consent, but it had predicted that the proposal would not be approved by the Judicial Conference unless it contained the consent requirement.

Since the Conference had adjourned without taking any formal actions, Judge Scirica reported that the Chief Justice decided to put the video conferencing proposal to a mail vote of Conference members, rather than postpone it for discussion at the next meeting of the Conference. The members voted by mail to approve the amendments.

Judge Scirica reported that the Advisory Committee on Civil Rules had conducted a very successful two-day conference at the University of Chicago Law School in October at which prominent members of the bench, bar, and academia explored a variety of issues associated with FED. R. CIV. P. 23 and class actions. He thanked Judge David Levi, Judge Lee Rosenthal, Professor Edward Cooper, and Professor Richard Marcus for their work in planning the conference, and he urged the members to read the notes of the conference.

Judge Scirica reported that the Chicago conference participants had discussed the proposed amendments to Rule 23 published by the advisory committee in August 2001, as well as an "informal call for comments" suggesting additional Rule 23 amendments that would authorize a federal court to preclude duplicative class actions in other courts. He noted that the advisory committee had decided not to publish the additional amendments because of concerns — under both the Rules Enabling Act and the Anti-Injunction Act — as to whether injunctions against state class actions could be authorized by federal procedural rule. Nevertheless, he said, the committee wanted to obtain the views of the public on the preclusion proposals.

Judge Scirica said that most of the panelists and participants at the conference had expressed the view that duplicative and or overlapping class actions are a serious problem. Many of them, he said, had complained that some lawyers — after being denied class certification in a federal or state court — bring a series of repetitive class actions in different state courts. Nonetheless, he added, most of the participants doubted that the problems raised by duplicative class actions could be resolved exclusively through the federal rules process.

Judge Scirica said that the advisory committee is of the view that duplicative class actions raise real problems and merit a legislative solution. He noted that the Judicial Conference has taken a position against the minimal diversity bills pending in Congress. But, he said, the advisory committee would continue to explore potential legislative action, working in coordination with the Federal-State Jurisdiction Committee and other committees of the Judicial Conference.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 7-8, 2001.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office had been monitoring 22 bills pending in the 107th Congress that would impact the federal rules. He noted that the recently enacted USA PATRIOT Act had amended FED. R. CRIM. P. 6 and 41 directly by statute.

Mr. Rabiej reported that legislation was pending in the Senate to overturn the "McDade amendment" and require the Judicial Conference to recommend attorney conduct provisions to Congress. He also noted that minimal diversity class action legislation was likely to be passed by the House of Representatives, but not the Senate. The omnibus bankruptcy reform legislation, he said, had passed both houses of Congress and was still pending in conference committee. He pointed out that the Advisory Committee on Bankruptcy Rules had been very active in drafting amendments to the bankruptcy rules and forms in anticipation of possible enactment of the legislation.

Mr. Rabiej noted that the separate “style” and “substantive” packages of proposed amendments to the criminal rules, which had been approved by the Judicial Conference in October 2001, had been merged into one package and were pending before the Supreme Court.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil noted that the agenda book for the committee meeting contained a status report on the various educational and research projects of the Federal Judicial Center. (Agenda Item 4)

He drew the committee’s attention to three Center publications: the new Handbook on Courtroom Technology; a new guide to alternative dispute resolution; and a fourth edition of the Manual for Complex Litigation, which is still in preparation.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito presented the report of the advisory committee, as set forth in his memorandum and attachment of November 30, 2001. (Agenda Item 8)

He pointed out that the advisory committee had not held a winter meeting, but an extensive package of proposed amendments to the Federal Rules of Appellate Procedure was pending in the Supreme Court, following approval by the Standing Committee in June 2001 and by the Judicial Conference in September 2001.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small presented the report of the advisory committee, as set forth in his memorandum and attachments of December 14, 2001. (Agenda Item 6)

He noted that the advisory committee's meeting of September 13, 2001 had been canceled because of the tragic events of September 11.

Judge Small reported that the advisory committee had been working diligently, with the help of a subcommittee, to draft forms to implement the omnibus bankruptcy reform legislation pending in Congress. He pointed out that the statute would become effective 180 days after enactment. Therefore, he said, the committee believed it essential to have new forms ready for Judicial Conference approval and submission to publishers of forms.

FED. R. BANKR. P. 1005
OFFICIAL FORMS 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19

Judge Small said that the advisory committee had voted to seek authority to publish proposed amendments to the bankruptcy rules and forms that would limit disclosure of social security number and other identifiers to the last four digits. The amendments would implement the new privacy policy recently recommended by the Court Administration and Case Management Committee and approved by the Judicial Conference.

Judge Small pointed out that the last-four-digit proposal did not enjoy the support of every member of the advisory committee. Moreover, provisions of the Bankruptcy Code require debtors to include their social security numbers in any communications with creditors (§ 342) and document preparers to include their social security numbers on all documents (§ 110). Judge Small said that the Department of Justice and the Internal Revenue Service have serious reservations about the proposal. He added that the advisory committee would consider the matter further at its March 2002 meeting, after reviewing all the public comments, including those of DOJ and IRS. It planned to report back to the Standing Committee at the June 2002 meeting.

The committee without objection approved the proposed amendments for publication.

Judge Small noted that the advisory committee at its March 2002 meeting would further consider the proposed revision of FED. R. BANKR. P. 2014 governing disclosure responsibilities of a professional.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kyle and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachment of December 15, 2001. (Agenda Item 7)

Judge Kyle reported that the advisory committee had published proposed amendments to FED. R. CIV. P. 23 (class actions), 51 (jury instructions), and 53 (masters). He noted that the advisory committee will continue to consider what might be done to address the problem of overlapping class actions.

Professor Cooper noted that the advisory committee is considering whether problems associated with discovery of computer-based information can, or should, be addressed by amendments to the civil rules. He said that the advisory committee is concerned that any new rule addressing electronic discovery could soon become obsolete.

Professor Cooper reported that a number of participants at the University of Chicago class action conference had recommended that the advisory committee address again the issue of settlement classes. They suggested that since the *Amchem* and *Ortiz* decisions, lawyers seem to be "gun shy" about settlement classes and do not use them for fear of being overturned in the courts of appeals. He noted that the advisory committee had published a modest settlement class proposal in 1996, which was cited in the *Amchem* opinion. But, he said, the committee withdrew the proposal after publication in order to monitor the case law in the wake of *Amchem* and *Ortiz*.

Professor Cooper suggested that the advisory committee would likely address settlement classes again, but not in the coming year. He observed that practical distinctions exist among the various types of class actions. Antitrust and securities cases, for example, may have different dynamics from mass tort or consumer class actions.

One of the participants observed that the focus of class action reform appeared to have shifted over time. He noted that the advisory committee had once concentrated much of its efforts on the class certification decisions. Later, the focus shifted to settlement classes and the right of class members to opt out. Now, he said, the attention of bench and bar is directed largely to duplicative class actions. He pointed out that addressing the problems of duplicative class actions will be very difficult because of the implications of our system of dual federal and state sovereignty. He added that a legislative solution will be necessary, and Congress will appreciate the committee's advice.

Another participant urged the advisory committee to take a much broader, fresh approach to class actions. Putting aside the federal-state jurisdictional questions for the moment, he said, the committee might undertake a project to examine the development of class action suits in other countries, such as Canada, Britain, Australia, and Brazil. In the process, he said, the committee could study how those countries define classes, provide due process, and promote efficiency. He added that more attention should be devoted to examining the merits and substantive validity of individual claims. Other participants endorsed the suggestion, and Judge Scirica asked that it be brought to the attention of the advisory committee.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes' memorandum and attachments of December 3, 2001. (Agenda Item 8)

FED. R. CRIM. P. 6 and 41

Judge Carnes reported that the USA PATRIOT Act had directly amended FED. R. CRIM. P. 6 and 41. But the statutory amendments will be overridden by operation of law under the supersession clause of the Rules Enabling Act when the restyled criminal rules take effect on December 1, 2002. To avoid nullifying the provisions that Congress had just written, he said, the advisory committee had redrafted the two rules to conform to the language and order of the restyled rules. He noted, for example, that the language of the statute was based on the old rules, rather than the restyled rules.

Judge Carnes pointed out that the advisory committee made fewer changes in Rule 6 than the Style Subcommittee had recommended. The committee, he said, decided to err on the side of retaining the awkwardness and ambiguity of the statutory language in order to avoid the risk of making substantive changes in the legislation. He noted that the committee had resolved the statutory ambiguity as to which court law-enforcement officers must notify when they disclose grand jury information under Rule 6(e). On the other hand, he said, the committee did not attempt to resolve other ambiguities in the statute, such as clarifying the meaning of "United States person" or "protective official." He said that there were fewer problems with the statutory revision of Rule 41, and the advisory committee adopted more of the Style Subcommittee's suggestions in restyling that rule.

Judge Carnes recommended that the rules be approved by the Standing Committee and forwarded to the Judicial Conference for approval in March without publication. They would then be sent promptly to the Supreme Court for integration into the body of restyled rules pending before the Court.

One of the members asked whether Congress will be concerned about the committee "tinkering" with its language. Judge Carnes responded that the committee is being helpful to Congress, both in avoiding the supersession problem and in blending the statutory language with the language of the rest of the Federal Rules of Criminal Procedure. Judge Scirica added that the advisory committee had done the right thing, and the matter will be brought to the attention of appropriate Congressional staff.

The committee without objection approved the amended rules.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur presented the report of the advisory committee, as set forth in Judge Shadur's memorandum of December 1, 2001. (Agenda Item 9)

Judge Shadur reported that the advisory committee had canceled its October 2001 meeting.

He said that the committee had published proposed amendments to FED. R. EVID. 608(b) (evidence of character and conduct of a witness) and 803(b)(3) (hearsay exception for statement against interest) for public comment. But, he noted, the scheduled public hearing on the amendments had been canceled for lack of witnesses. He added that the advisory committee would consider the written public comments and address the amendments again at its April 2002 meeting.

Judge Shadur reported that he had returned the Judicial Conference questionnaire on the committee system, recommending that the Advisory Committee on Evidence Rules be continued. Judge Scirica agreed strongly with Judge Shadur's recommendation, pointing out that the evidence committee is essential to the Conference's work, especially in responding to Congressional initiatives on evidence issues.

ATTORNEY CONDUCT RULES

Judge Scirica reported that the Standing Committee had spent a great deal of time on attorney conduct issues over the last several years. He noted that the subject had come to the committee's attention originally as a byproduct of the local rules project, which had revealed that many district courts have local attorney conduct rules conflicting with those of the supreme court of their state.

He said that there is a general consensus that if the committee were to take any action regarding attorney conduct, it would be to recommend a rule of "dynamic conformity," *i.e.*, tying

attorney conduct in the federal courts to the prevailing conduct rules of each respective state. He pointed out that conduct problems attracting the most attention involve regulation of federal government attorneys — especially, but not exclusively, conflicts over Rule 4.2 of the rules of professional conduct (communications with persons represented by counsel). He noted that potential revision of Rule 4.2 has been the subject of extensive discussions, not just with the Standing Committee, but among the Department of Justice, the Conference of Chief Justices, and the American Bar Association.

Judge Scirica noted that the committee had decided in 2001 not to take any further action on possible attorney conduct rules until the new Administration has had a chance to consider its options and decide upon a position. He pointed out that the Ethics 2000 project had recommended that the American Bar Association adopt a revised Rule 4.2 authorizing a government attorney to communicate with a represented person if authorized by court order.

He added that Congress might still enact legislation requiring the judiciary to write rules or make recommendations regarding attorney conduct. He said that it would be better for the judiciary if there were a consensus on the substance of the rules among Congress, the Department of Justice, the American Bar Association, and the states. The rules committee, he said, would be prepared to formalize any agreements through the federal rules process.

Deputy Attorney General Thompson said that while Rule 4.2 is the subject attracting the most attention and controversy, choice of law presents difficult problems and causes a great deal of uncertainty among Department lawyers. In addition, problems continue to arise from the impact of the *Gatti* decision on the conduct of Department of Justice lawyers in supervising undercover operations.

He said that the Leahy-Hatch bill pending in Congress would provide a mechanism for resolving the various issues flowing from Rule 4.2, choice of law, and undercover operations. One of the participants suggested that the Department could negotiate these matters further with the American Bar Association and the Conference of Chief Justices. Chief Justice Wells volunteered to help facilitate negotiations.

Judge Scirica noted that there was a consensus among the committee members to take no action on attorney conduct rules until the committee is required to do so.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Professor Capra presented the report of the Technology Subcommittee. He said that the subcommittee had participated with the Court Administration and Case Management Committee in preparing model local rules for the district and bankruptcy courts to implement electronic case filing (ECF). He noted that he and Nancy Miller of the Administrative Office had drafted the

rules in large measure by adapting provisions found in the local rules of the existing ECF pilot courts. He added that it was unlikely that there would be national rules governing ECF for a long time because it will take several years to deploy the ECF system in all the courts and to gather the necessary experience to identify and address problems arising in the new digital environment.

One participant suggested that drafting model local rules may be inconsistent with the committee's long-standing policy of promoting national uniformity and limiting local rules. Professor Capra and others responded that ECF is an appropriate exception to the general policy. The use of local rules, he said, is simply unavoidable in such a fast-growing area as electronic filing.

Professor Capra pointed out that some courts have taken the position that they may require the bar to file case papers electronically — a position that appears inconsistent with FED. R. CIV. P. 5. He said that the subcommittee and the Administrative Office have advised courts that the national rule contemplates that electronic filing is voluntary at this point.

Mr. Rabiej noted that the Court Administration and Case Management Committee will ask the Judicial Conference to establish a pilot program permitting selected courts to provide the public with electronic access to criminal case records. Professor Capra responded that it is important for the Technology Subcommittee to participate in the drafting of any model rules governing criminal cases. One member then suggested that the rules committees take the lead in preparing any model rules.

Professor Capra reported that he and Mr. Lafitte, chair of the Technology Subcommittee, had also provided assistance to the Court Administration and Case Management Committee in developing a report on privacy and public access to electronic case files. The report was approved by the Judicial Conference on its September 2001 consent calendar. He noted that the key finding in the report is that case documents should be made available electronically to the same extent that they are available at the courthouse — except for criminal cases, social security cases, and social security numbers and other "personal data identifiers." He pointed out that the Court Administration and Case Management Committee is now in the process of implementing the privacy statement and is pushing the Advisory Committee on Bankruptcy Rules to amend the rules to limit the use of social security numbers to the last four digits.

Professor Capra also reported that the Technology Subcommittee is working with the Advisory Committee on Civil Rules on issues relating to computer-based discovery. He also noted that he had produced a report for the Advisory Committee on Evidence Rules concluding that the evidence rules do not need to be amended at this time to take account of electronic evidence.

LOCAL RULES PROJECT

Professor Coquillette presented the report of the Local Rules Project (Agenda Item 12). He stated that Congress had been complaining about local court rules since 1983. The primary concern of Congress, he said, is that local rules, unlike the national rules, do not pass through a Congressional review process. Therefore, local rules — particularly those inconsistent with the national rules — are viewed as an "end run" around the statutory process.

He added that Congress in the 1980s had considered making the Standing Committee responsible for reviewing all local district court and circuit court rules and abrogating those inconsistent with statutes or national rules. As eventually enacted, though, the 1988 Rules Enabling Act amendments shifted review authority over local district court rules to the respective judicial councils of the circuits, while retaining review of circuit court rules in the Judicial Conference. The 1988 amendments, he said, also added a requirement that all local rules be subject to public notice and an opportunity for comment.

Professor Coquillette reported that the Judicial Conference, at the urging of Congress, had authorized the Standing Committee in the 1980s to conduct a complete review of all the local rules of the federal courts. He added that Professor Squiers had been engaged by the committee to direct the first local rules project. He explained that she first collected and analyzed all the local court rules and then presented each court with a report pointing out any local rules that appeared to conflict with the national rules, duplicate the national rules, or raise other concerns. Most of the courts responded positively to her suggestions and voluntarily deleted or modified their questionable rules. Professor Squiers' work, he said, had also identified for the advisory committees a number of innovative local rules that eventually formed the basis for later amendments to the national rules.

Professor Coquillette pointed out that even though the first local rules project had resulted in eliminating many local rules, the Civil Justice Reform Act of 1990 undid many of the gains by encouraging the adoption of new local court rules. More recently, he said, Congress, the American Bar Association, and numerous commentators have been complaining again about "balkanization" of federal practice and the proliferation of local rules. Accordingly, he noted, the Standing Committee had decided to undertake the second local rules project.

Professor Coquillette reported that Professor Squiers had been engaged again to conduct the new local rules project. He explained that she had been following essentially the same methodology used in the first study and had completed most of the work already. He praised her excellent report of December 10, 2001 (set forth as Agenda Item 12A) and pointed to its conclusion that the number of local district court rules has now increased to 5,575. He added that Professor Capra had been asked to prepare a talking paper (Agenda Item 12B) setting forth a number of options that the committee might consider in acting on the local rules project report.

Professor Capra explained that his report addressed three very broad questions:

1. Which local rules are objectionable?
2. How can the findings of the local rules project be best used in any effort to have the objectionable local rules rescinded?
3. Are there any other remedies that might reduce the proliferation of objectionable local rules?

1. Which local rules are objectionable?

Professor Capra said that four categories of local rules should be viewed as objectionable. First, he said, local rules that contradict the national rules are obviously objectionable because they are prohibited explicitly by the national rules, create difficulties for lawyers, and undermine national uniformity. Those that directly contradict the letter of the national rules are relatively easy to deal with, he said. But other local rules may only violate the spirit, rather than the letter, of the national rules or may conflict with case law construing the national rules.

Second, he noted, local rules that duplicate the national rules are also prohibited specifically by the national rules. He noted that Professor Squiers' report points to local rules that paraphrase national rules or replicate part, but not all, of a national rule.

Third, Professor Capra said that local rules that do not conform with the numbering system of the national rules are objectionable because they violate FED. R. CIV. P. 83 and its counterparts in the other federal rules.

Finally, he noted, some local rules are objectionable because they are outmoded — governing practices that have been superseded by statute or no longer exist in the federal courts.

2. How can the project's findings be used?

Professor Capra said that the goals of the local rules project are more than informational. The project, he said, should also be used as a vehicle for abrogating objectionable local rules. He suggested that it might be best to follow the same low-key informational and persuasive approach used in the first project, relying for the most part on voluntary compliance by the courts after considering the recommendations of the project, the rules committees, or the judicial councils of the circuits.

3. What other remedies might be used beyond the local rules project findings?

Professor Capra described several possible courses of actions that might be taken to reduce the proliferation of local rules.

- The judicial councils of the circuits have the statutory authority to review and abrogate local rules. But, he said, dedicated funding has not been provided for the councils to carry out their oversight responsibilities. He suggested that it might be appropriate to provide special funding to the circuits to enable them to conduct in-depth reviews of local rules and monitor compliance with the national requirements. In the absence of — or in addition to — providing funding to the circuit councils, consideration might be given to having the Standing Committee or the Administrative Office offer assistance to the councils in their efforts to oversee local rules.

- The advisory committees had considered a variety of proposals to limit local rule amendments, such as by specifying that they may take effect only once a year, by requiring that they be filed with the Administrative Office and the pertinent circuit council, or by requiring that they be approved by a central authority or the circuit council. The proposals were deferred for a variety of reasons, including uncertainty whether the Rules Enabling Act authorizes regulation of the local rules process.

- Model local rules might be prepared to address a number of typical local rule topics. But, he said, model rules in the past have had only limited success. Moreover, he suggested, a rule that is good enough to be a model on a nationwide basis is probably good enough to be a national rule.

- Both local rules projects have identified several areas in which a good deal of local rulemaking activity occurs. The advisory committees might focus on these areas and prescribe national rules that effectively preclude local rulemaking.

- He noted that one scholar has suggested an amendment to the Rules Enabling Act to limit local rules to certain specified topics.

- A former member of the Standing Committee once moved that the number of local rules in each court be limited to a specific, small number.

- Professor Capra pointed out that local rules provide a good way to experiment with new procedures that might lead eventually to national rules. But the experiments, he said, are unregulated and uncontrolled. In 1991, the Advisory Committee on Civil Rules had proposed an amendment to FED. R. CIV. P. 83 to permit district courts to experiment for up to five years with local rules that conflict with national rules. The amendment, he said, was later withdrawn because of concerns that it conflicted with the Rules Enabling Act.

- The advisory committees could review all the existing federal rules that expressly invite or require local rules and delete those not essential to deal with unique local concerns.

- Finally, he said, many local rules are not really "rules" at all, but merely sources of administrative information. This type of information, he said, might be deleted from local rules and placed in standard operating procedures or manuals available to all practitioners.

Following Professor Capra's report, Judge Scirica asked the participants to comment.

One attorney member said that the lawyers in his firm do not have major problems with local rules because they make special efforts to stay current with the rules and procedures of each court in which they practice. But a second attorney member stated that local rules are a major problem. He said that many of them serve no legitimate purpose, merely reflect the personal preferences of local judges, undermine national uniformity, and add costs for clients. He agreed that some local rules are needed to address truly unique local situations or to experiment in areas not covered by the national rules. But, he concluded, reform is badly needed, and the Standing Committee should take an activist role in seeking elimination of unnecessary local rules. A third attorney member took a "midway" position, noting that the lawyers in his firm stay current on local rules and engage local counsel when needed. He agreed that local rules often reflect little more than the style and preferences of the local judges. But, he added, some local rules are clearly beneficial because they provide guidance to attorneys in areas not addressed by the national rules.

One of the judges emphasized that local rules serve important purposes. First, he noted, they put institutional pressure on the individual judges of a court to follow uniform procedures within the court. Second, they fill many gaps in the national rules. Third, he said, they provide important guidance to lawyers on practical details. He concluded that local rules are beneficial for both bench and bar, as long as they are widely available to the bar and fairly applied.

Several other judges agreed, suggesting that complete uniformity in practice is simply not practicable. Diversity, they said, is inevitable in certain areas, such as motion practice. One added that it is the lawyers in his district, rather than the judges, who want additional local rules. One judge suggested that there are honest differences of opinion and approach among courts, and it is not always easy to determine whether local practices are inconsistent with the national rules. But two judges emphasized that national law requires national procedures, and they urged judges to work for a reduction in local procedural variations.

One participant pointed out that experience gathered under local rules can provide a sound empirical basis for promulgating new national rules. He referred to the requirement in FED. R. CIV. P. 26(f) that the parties confer early in a case, which, he noted, had come from local court

rules. He added that FED. R. CIV. P. 56, governing summary judgment, is a rich field of local rulemaking that could serve as the basis for revising the national rule.

One member suggested that the committee take a "hardball" approach towards local rules, but several other participants emphasized that it will be much more productive for the committee to seek voluntary compliance by the courts. One member added that Congress is not particularly moved by inconvenience to lawyers who practice in several jurisdictions. But, he said, it is concerned about local rules that conflict with the national rules or address important policy issues. **Therefore, he said, the committee should focus its attention on those local rules that conflict with the national rules or present serious policy implications. Judge Scirica announced that there was a consensus among the members on this point. He also said that there was general agreement that the advisory committees should consider drafting future national rules to govern those areas where local rules are seen as causing problems.**

One member pointed out that statutory authority exists to enforce national uniformity. He reported that the circuit executive's office in his circuit reviews all local rules and negotiates directly with each court to change any local rule that appears to conflict with the national rules. If a dispute is not resolved through this negotiation, he said, the circuit council will act on the matter. Another participant noted, however, that the circuits vary substantially in the attention and priority they give to local rules. Some circuits, he said, seem to take the responsibility seriously, while others give it little attention.

One participant suggested that the committee speak with the chief judges, support the circuits in their review activity, and seek additional funding or assistance for the circuits, if necessary. Another emphasized that the focus of discussions with the circuits should be on the inconsistency of some local rules with the national rules, not on the proliferation of local rules. Another participant recommended that the discussions with the circuits be used as a vehicle to obtain compliance by the remaining district courts that have not renumbered their local rules in accordance with FED. R. CIV. P. 83.

Another participant emphasized the importance of communicating with the district courts before contacting the circuits. She suggested that a report be sent to each court with appropriate recommendations and a request for cooperation. The local rules project and its objectives, she said, could also be discussed at the conference of chief district judges and other judges' meetings. Other members recommended that the chief judges of the circuits be copied on any reports sent to the district courts.

Judge Scirica reported that the June meeting of the Standing Committee will have a very full agenda, and it is not likely that the local rules project could be considered again before the committee's January 2003 meeting. But, he said, several actions could be taken before the next committee discussion. **He stated that there was a consensus among the members that the committee should proceed first by sending reports to the district courts, soliciting their**

response, and seeking voluntary compliance. The issue of appropriate circuit council involvement will be deferred by the committee to a later date. He agreed also to speak about the local rules project at the next meeting of chief circuit judges in March 2002.

OBSERVATIONS ABOUT THE RULEMAKING PROCESS

The committee spent its Friday session reflecting on the current status and the future of the rulemaking process — or, as defined by Professor Coquillette: "Where we have been and where we are going." The discussion focused on five topics:

1. the deliberative procedures of the rulemaking process;
2. restyling the rules;
3. the style and function of committee notes;
4. response to technological change; and
5. simplified rules of civil procedure.

1. *The deliberative procedures of the rulemaking process*

Professor Hazard introduced the discussion and distributed a short memorandum reflecting his views on the rulemaking process. He suggested that the rulemaking process is sound, emphasizing that it includes: careful inquiry and drafting by the advisory committees; thorough review of all proposals by the Standing Committee; substantial opportunity for public input; reconsideration by the committees following public comment; and review by the Judicial Conference, the Supreme Court, and Congress. He concluded that fundamental changes are not needed in the process. He then made six specific observations:

- Most amendments worth doing — such as those involving class actions and discovery reform — are controversial to some degree.

- Other amendments, such as clarifications and minor improvements to the rules, should be issued in batches every few years so that judges and lawyers do not have to remain on alert every year to minor changes in the rules. He added that these changes might be merged with the restyling process.

- The rulemaking process is long and complicated, but it must remain so. Great care must be taken in researching and drafting rules. And substantial time is needed to provide meaningful review and public input. But emergency amendments to the rules can be handled more expeditiously on an ad hoc basis.

- Many of the important and controversial changes in the rules arguably affect "substance" and may lie outside the scope of the rules process. Changes of this

nature should be fully disclosed to Congress at an early stage in the revision process. Some of these changes might better be enacted by Congress itself.

- The rules committees must always be attentive to the superior political authority vested in Congress.

- The rules committees should maintain good and frequent communications with relevant committees of Congress.

Several participants concurred with Professor Hazard that the rulemaking process must remain lengthy and complex. They pointed out, among other things, that the process has become more political, and they noted that bar and litigant groups follow the committee process closely and are more organized and active in promoting or opposing proposed rule amendments.

One participant said that rules changes may substantially affect policy, thereby touching on the domain of Congress. It is more difficult to write rules today than in the past, he said, because the rules process is much more open and the stakes involved in some rules changes are high. The committees must consult with and involve a wide variety of competing interest groups in the process. In the final analysis, he said, Congress has authorized the judiciary to exercise the rulemaking function, but subject to its own ultimate oversight.

Another participant emphasized the need of the rules committees to show restraint in pursuing rule amendments and to be sensitive to the needs of practitioners and litigants. He emphasized the importance and advisability of facilitating substantial public input into the rules process. He noted that lobbyists now regularly attend meetings of the Advisory Committee on Civil Rules. And he observed that the Advisory Committee on Civil Rules conducts periodic, structured conferences with a broad spectrum of the bench and bar on controversial subjects — such as discovery and class actions. He emphasized that these conferences are an excellent vehicle for the bar to share its first-hand experiences and opinions with the committee. He also pointed to the advantages of the advisory committees using subcommittees to address particular subject areas in depth. And he urged the committees to continue taking advantage of the research capabilities of the Federal Judicial Center. Through these various devices, he said, the advisory committees have been able to develop a deep understanding of the topics they are addressing and an appreciation of the needs and interests of the bar.

One participant said that the rules committees should be very responsive to the needs of the bar and correct any rules that cause problems for practicing lawyers. On the other hand, he said, the committees should be very cautious in addressing any controversial matters in which Congress might have an interest.

Another participant emphasized that the "heavy lifting" in the rules process must continue to take place in the advisory committees. The essential role of the Standing Committee, she said, is to focus on the integrity of the process and to take into account the anticipated views of the

Judicial Conference, the Supreme Court, and Congress. As a normal rule, she said, the Standing Committee should defer to the expertise of the advisory committees on proposed amendments.

Another participant lamented that the district courts are functioning less and less as trial courts. He pointed to wholesale delegations of responsibilities by district judges, the movement towards greater use of mediation and other ADR, and the growing popularity of arbitration clauses in contracts. He said that the rules offer a vision of trial courts that differs sharply from the emerging reality.

2. Restyling the rules

Judge Scirica reported that the restyling project had been initiated under the chairmanship of Judge Keeton. He noted that the appellate rules and criminal rules have now been completely restyled, and the products are a vast improvement over the former rules. He pointed out that a great many disparities and inconsistencies have been eliminated, and the restyled rules are much easier to read and understand. He said that the committee now has to decide whether to proceed with restyling the civil rules.

One participant emphasized that the restyling process should be divorced from any substantive changes in the rules. He said that substantive changes should proceed on a different path. Judge Garwood responded that the Advisory Committee on Appellate Rules had encountered many instances in which its efforts to revise a rule purely for style had uncovered substantive issues. And, he added, that there is a higher risk of making unintentional substantive changes in the civil rules than in the appellate rules. He observed that it would be difficult for the Advisory Committee on Civil Rules to take on the complete restyling of the civil rules at this point because its agenda is already crowded with such matters as class actions, discovery, and simplified civil procedures.

Judge Carnes added that the restyling of the criminal rules had taken a great deal of effort, including 14 meetings and active involvement of style consultants, two ad hoc subcommittees, and the advisory committee itself. He pointed out that the recent experience with the criminal rules had shown that, as a practical matter, the rules could not have been restyled in batches. Rather, he said, the Advisory Committee on Criminal Rules frequently had to examine the entire body of rules in order to refine its definitions, and in making changes in one rule it had to make conforming changes in a number of other rules.

Judge Carnes said that several factors had contributed to the success of the criminal rules restyling project. First, he said, the style consultants had produced a very good first draft of restyled rules, from which the subcommittees and advisory committee worked. Second, the committee had engaged the expert services of Professor Stephen Saltzburg, former advisory committee reporter and member. Third, he said, the advisory committee had adopted a tough schedule for completing the project, and it adhered to the schedule faithfully. And, finally, the

committee had focused its attention on restyling the rules, and it did not allow itself to get bogged down on substantive issues. Rather, it deferred all substantive issues or referred them to a subcommittee or individual member for additional research and recommendations. Thus, the committee produced two separate packages of amendments — a package of purely style changes and a separate package of amendments that included substantive changes.

Several participants suggested that the results of restyling the appellate and criminal rules are self-evident, pointing out that side-by-side versions of the old and new rules demonstrate how much easier the new rules are to read and understand. One participant responded, however, that any changes in the rules, even stylistic changes, may impose costs on practitioners and lead to new problems of interpretation.

Professor Cooper reported that the Advisory Committee on Civil Rules had begun to restyle the civil rules several years ago and had produced a partial product. He said that the civil rules restyling process had been very difficult, and the advisory committee simply could not tell what some current rules actually mean. He added that it will be difficult to present the bench and bar with a complete, restyled set of all the civil rules at one time and expect meaningful public comments, even if the comment period were extended to a full year. Lawyers, he said, will focus on those rules of particular concern to them, but few will examine all the restyled civil rules carefully. He suggested that there may be some advantages to proceeding with the civil rules in batches, making style and substantive changes at one time. In conclusion, he said, restyling the civil rules will be an enormous undertaking for the advisory committee, particularly in light of its other work, but the project will produce great benefits.

Professor Kimble emphasized that redrafting a set of rules must be undertaken at one time, although the committee might elect to publish the revised rules in batches for public comment.

Judge Scirica said that he had become a convert to the restyling process, and he emphasized the importance of learning from the recent experience and successes of Judges Garwood, Carnes, and Gene Davis. He agreed with Professor Cooper that restyling the civil rules will be a major undertaking, but will be well worth doing.

3. The style and function of committee notes

Judge Stotler began the discussion on the appropriate role and style of committee notes by pointing to the following two internal committee rules and inviting comment on them:

1. Notes accompanying rules are “Committee Notes,” not “Advisory Committee Notes.”

2. A note may not be changed unless a corresponding change is also made in the text of the pertinent rule.

She explained that the Standing Committee from time to time makes changes in the text of committee notes prepared by the advisory committees, just as it changes the text of proposed rule amendments. Thus, the notes effectively become the product of both the advisory committee and the Standing Committee.

Judge Stotler said that the long-standing rule against changing a committee note without making a corresponding change in the accompanying rule is designed in part to avoid blind-siding lawyers, who are alert to changes in the rules but may overlook the notes. Several participants agreed that the rule is sound. They pointed out that committee notes are a form of legislative history, reflecting the intentions of the drafters at the time a rule is amended or added. They argued that it would be inappropriate to change or supplement the notes at a later time, especially if there has been a major turnover in committee membership.

Other participants pointed out that changes in the rules themselves are subject to the full Rules Enabling Act process, including review by the Judicial Conference, the Supreme Court, and Congress. But, they said, making changes in committee notes alone could circumvent the statutory process, and the changes could affect substance through an official reinterpretation of the rules. One participant added that if the committees were to revise the notes, the public would come to expect and rely on committee notes to accurately and timely reflect case law developments.

Other participants objected to the rule and suggested that updated notes would be very helpful to the bar. One participant said that revised notes would be particularly beneficial when the text of a particular note and its rule are not completely in accord or when case law diverges from the text of the note or rule. She noted, for example, that from the outset the committee notes to the Federal Rules of Evidence had been inconsistent with the text of several of the rules enacted by Congress. But, she said, the committee's rule had prevented the advisory committee from revising the evidence notes to alert lawyers to inconsistencies and traps. Instead, she said, Professor Capra's excellent paper documenting the discrepancies between the rules and notes had been published, at the committee's urging, as a separate document by the Federal Judicial Center. But his paper is not as readily available to lawyers as committee notes. At a minimum, she said, the rule against changing notes should not be absolute, and exceptions should be allowed in appropriate cases.

Several participants suggested that committee notes should generally be short. They said that a note should simply explain the reasons for an amendment and not elaborate on case law. One participant emphasized that notes should never add substantive material not specifically addressed in the text of a rule. He expressed concern that some notes had been used as a substitute for rulemaking, suggesting that there is a trend towards addressing controversial matters in the notes, rather than in the text of the rules.

Other participants disagreed, suggesting that longer notes elaborating on the case law are very valuable and provide the bar with practical assistance and guidance. One participant added that notes are read and followed carefully by the bar. He said that many of the comments voiced at the recent Chicago class action conference had been directed to the proposed committee notes, rather than the rules. He suggested that certain rule amendments require more elaboration than others. Thus, notes can be very short in many cases. But rule amendments that codify existing court practices may require additional explanation. The notes, he said, communicate to the bar the various factors considered by the committees and inform them how issues are resolved. He noted that the electronic era had made committee notes readily available to the bench and bar, and a greater range of background materials will be available electronically in the future, such as committee reports, minutes of meetings, agenda items, and transmittal letters. In conclusion, he said, the scope and length of committee notes are complex issues that are being addressed sensitively by the advisory committees.

4. Response to technological change

Mr. Lafitte, former chair of the Technology Subcommittee, reported that the subcommittee and the civil advisory committee had been studying a variety of issues dealing with discovery of computer-generated materials. But, he said, the committees had not reached the point where they believe that rule changes are warranted. Professor Capra added that the committees had recently conducted a conference on electronic discovery at Brooklyn Law School. The judge participants at the conference, he said, had argued against making any changes in the rules, emphasizing that the bench and bar are adapting the current rules to the new digital environment in a common-sense manner. On the other hand, he said, several lawyer participants had argued for rule amendments to give the bar additional guidance on discovery of information in electronic form.

Judge Smith noted that the Federal Judicial Center has an expert on its staff with a national reputation in the field of electronic discovery. She reported that he is besieged with requests from courts and other organizations for advice and speeches on the subject. She said that she was pleased that the rules committees have placed the subject on their agenda, since many lawyers and judges would appreciate additional guidance. One of the participants added that most corporations and professionals now keep virtually all their business records in electronic form and have revamped their internal business practices to anticipate potential discovery of their digital records.

Mr. Lafitte and Professor Capra reported that the subcommittee, in conjunction with other Judicial Conference committees, is also monitoring the electronic case files project in the courts and the privacy issues flowing from the project. Several of the participants said that electronic case files provide major benefits to the bench and bar, and they encouraged the committee to do whatever it can to facilitate the conversion to electronic case files.

5. Simplified rules of civil procedure

Judge Niemeyer and Professor Cooper reported briefly on the efforts of the Advisory Committee on Civil Rules to draft simplified rules of civil procedure. Judge Niemeyer pointed out that people have complained that they simply cannot afford to litigate in the federal courts, but they might use the system if it did not have so many rules and procedural requirements. Moreover, he said, the use of arbitration clauses is growing, and mediation and other forms of ADR are enjoying increasing popularity. He suggested that there should be a way for litigants in appropriate cases to appear relatively quickly before a federal judge, present their case, and receive a prompt decision. Therefore, the advisory committee had decided to explore the concept of developing simplified procedural rules to be used in some civil cases. He noted that the committee had presented the concept to many judges and lawyers and had received enthusiastic responses from all.

He reported that Professor Cooper had prepared an initial draft of simplified procedural rules, which had been discussed at advisory committee meetings. He said that the threshold issue in drafting the rules is to identify which types of cases should be eligible for the simplified procedures. He said that the committee had explored several eligibility options, such as fixing maximum dollar amounts or requiring consent by all the litigants. He added that the advisory committee could continue to consider various procedural incentives to make the simplified proceedings attractive to litigants.

Professor Cooper said that it was particularly important for the advisory committee to know how much enthusiasm there is in the Standing Committee for proceeding with the simplified rules proposal. He noted that the project could be a very long term undertaking, and the advisory committee needed to know what priority to assign to it.

LONG-RANGE PLANNING

Mr. Rabiej reported that the chairs of most Judicial Conference committees meet as a group twice a year to discuss long-range planning for the federal judiciary. He said that long-range planning group had asked each Conference committee: (1) to identify strategic issues within its jurisdiction; (2) consider how it can incorporate long-range planning into its regular business; and (3) identify three to five events, changes, problems, opportunities, or issues facing the judiciary over the next few years.

Mr. Rabiej noted that the rules committees have been working on several important issues that might be the basis for long-range planning sessions, including the impact of technology, developments in class actions, the high cost of litigation, the decline in the rate of trials, and the proper scope of local rulemaking. Judge Scirica said that he and the staff would prepare an appropriate written response for the long-range planning group.

FUTURE COMMITTEE MEETINGS

The next meeting of the committee is scheduled for June 10-11, 2002, in Washington, D.C.

Judge Scirica reported that the following meeting had been scheduled tentatively for January 9-10, 2003. But, he said, some participants had recommended that the meeting — and future winter meetings — be held later in January. He said that he would consult with the Judicial Conference Secretariat to find out whether a later date is feasible in light of the Conference's tight schedule for submitting committee reports. [The meeting was later set for Thursday and Friday, January 16-17, 2003.]

Respectfully submitted,

Peter G. McCabe,
Secretary