Agenda E-18
Rules
September 2003

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

The Committee on Rules of Practice and Procedure met on June 9-10, 2003. All the members attended.

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

Participating in the meeting were Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Rules Committee Support Office, Jeffrey A. Hennemuth, Deputy Assistant Director for Judges Programs, James Ishida and Katherine Marrone, attorney advisors, all in the Administrative Office; Joseph Cecil of the Federal Judicial Center;

Professor Mary P. Squiers, Director of the Local Rules Project; and Joseph F. Spaniol, consultant to the Committee. Peter G. McCabe, the Committee's Secretary, was unable to attend the meeting.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules proposed amendments to Rules 4, 26, 28, 32, 34, 35, and 45, and new Rules 27(d)(1)(E), 28.1, and 32.1 with a recommendation that they be published for comment.

The amendments to Rule 4(a)(6) would clarify the conditions specified in the rule to reopen the time to appeal. Under the proposed amendments, a party may move to reopen the time to appeal only if the party had not received notice in accordance with Federal Rules of Civil Procedure 77(d) and 5(d) of the entry of judgment or order within 21 days after its entry. The amendments eliminate an unintended ambiguity that had arisen from the comprehensive restructuring of the Appellate Rules in 1998 concerning the specific type of notice that precludes later moving to reopen the time to appeal under this rule. The amendments also make it clear that the seven-day period to move to reopen the time to appeal is triggered only by written notice of the entry of judgment or order.

Amended Rule 26 and Rule 45 would substitute "Washington's Birthday" for "Presidents' Day" as one of the legal holidays for purposes of computing time and determining when court is open under the rules. New Rule 27(d)(1)(E) would provide that a motion, a response to a motion, and a reply to a response to a motion must comply with Rule 32 typeface and type-style requirements.

Under the proposed amendments to Rule 28, the provisions dealing with cross-appeals are transferred to a proposed new Rule 28.1. The new Rule 28.1 would collect in one place all the provisions dealing with briefing of cross-appeals now dispersed throughout the rules and would also fill in the present gaps in the rules regarding cross-appeals. The provisions in the new rule largely have been patterned after the requirements imposed by Rules 28, 31, and 32 on briefs in cases that do not involve cross-appeals.

The proposed amendments to Rule 32 and Rule 34 contain cross-references to new Rule 28.1 governing cross-appeals.

New Rule 32.1 would require courts to permit the citation of opinions, orders, or other judicial dispositions that have been designated as "not for publication," "non-precedential," or the like. It also would require a party to file a copy of the unpublished opinion, order, judgment, or other written disposition if it is not readily available in a publicly accessible electronic database. The proposed rule is narrowly drawn and only addresses the citation of unpublished opinions. The proposed rule takes no position on whether designating opinions as non-precedential is constitutional. Nor does it have any impact on the effect a court must give to an unpublished opinion.

The proposed amendments to Rule 35(a) resolve an inter-circuit conflict regarding the make-up of the vote for a hearing or a rehearing en banc. Under the proposed amendments, disqualified judges would not be counted in the "base" in determining whether a "majority" of the circuit judges voted in favor of an en banc hearing. The proposed amendments resolve the circuit conflict over the interpretation of 28 U.S.C. § 46(c), which provides that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service."

In 1973 the Judicial Conference supported legislation to amend § 46(c) to permit an en banc hearing on the vote of a majority of judges who were not disqualified to vote, instead of only on the vote of an absolute majority of the judges of the court, which was presumed to be required by the statute (JCUS-SEP 73, p. 47). In 1984, the Judicial Conference rescinded its earlier position, when it concluded that the statutory provision did not mandate the "absolute majority" rule (JCUS-SEP 84, pp. 55-56). Instead, the Conference recommended that each court of appeals adopt a local rule specifying the appropriate vote-counting procedure. The advisory committee concluded that national uniformity in vote-counting procedures is necessary as a matter of fairness and because no justifiable reason for different treatment has been shown.

Like the Judicial Conference in 1984, the advisory committee concluded that both the "absolute majority" and "case majority" vote-counting procedure represent reasonable interpretations of § 46(c). This conclusion is supported by the fact that, although a majority of the circuits now use the "absolute majority" approach, a substantial minority use the "case majority" approach, and even more circuits have used the "case majority" approach in the past. In the advisory committee's view, the proposed amendment to Rule 35(a) does not represent the use of a rule to supersede an inconsistent statute as much as it represents the use of a rule to embrace one of two reasonable interpretations of an ambiguous statute.

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

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1011, 2002, and 9014 and new Official Form 21 with a recommendation that they be

approved and transmitted to the Judicial Conference. The amendment to Rule 9014 was circulated to the bench and bar for comment in August 2002. The scheduled public hearing on the proposed rule amendment was canceled because no one asked to testify. The amendments to Rules 1011 and 2002 and new Official Form 21 are technical or conforming and were not published for public comment.

The proposed amendment to Rule 9014 exempts "contested matters" from the mandatory disclosure provisions of Rule 26 of the Federal Rules of Civil Procedure, which apply to bankruptcy proceedings in accordance with Rule 7026. Contested matters often involve time-sensitive matters. They typically are resolved well before the time when disclosure is required under Rule 26, rendering the mandatory disclosure provisions ineffective and counterproductive. The mandatory disclosure requirements, however, continue to apply to adversary proceedings and may apply in individual contested matters if directed by the court or the judge.

The proposed amendment to Rule 1011 changes the reference to Rule 1004 to conform with a recent amendment of that rule. Rule 2002 would be amended to specify that copies of notices to creditors in a chapter 11 case must be sent to the address for the Internal Revenue Service set out in the Rule 5003(e) mailing-address register.

The proposed new Official Form 21 implements the recent amendment to Rule 1007(f), which requires a debtor to submit a verified statement setting out the debtor's social security number. The form containing the full social security number would not be available to the public, consistent with the Judicial Conference privacy policy limiting disclosure of personal identification numbers on court documents. But the form would provide information to the clerk to include the social security number on the notice of the creditors' meeting, as required under Rule 2002(a)(1). A copy of the notice in the public court files, however, would show only the last four digits of the number.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference:

a. approve the proposed amendments to Bankruptcy Rules 1011, 2002, and 9014 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. approve the new Official Form 21 to take effect on December 1, 2003.

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

Approved for Publication and Comment

The advisory committee proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006 with a recommendation that they be published for public comment.

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

Under the proposed amendments to Rule 3004, which conform to § 501(c) of the Bankruptcy Code, the debtor and trustee must wait and may not file a proof of claim until the creditor's opportunity to file a proof of claim has expired.

The proposed amendments to Rule 3005(a) delete, because it is unnecessary, the language in the existing rule that permits a creditor to file a proof of claim that supersedes a claim filed on behalf of the creditor by a codebtor. The existing provision was intended to protect a creditor from being bound by a proof of claim filed by a codebtor on behalf of the creditor. But § 501 of

the Code and the proposed amendments to Rule 3004 obviate the need for the existing language, because a codebtor may no longer file a proof of claim until after the creditor's time to file has expired.

The proposed amendments to Rule 4008 set the deadlines for filing a reaffirmation agreement. The Committee approved publishing the amendments for comment at its last meeting.

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

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

The Committee approved the recommendations of the advisory committee to publish the proposed amendments to Rules 1007, 3004, 3005, 7004, and 9006 to the bench and bar for comment along with the earlier-approved amendments to Rule 4008.

Informational Item

A panel consisting of a judge, an academic, and several practitioners well experienced in complex litigation briefed the advisory committee on current developments in mass-tort litigation handled in bankruptcy. The number of large-scale bankruptcies involving mass tort litigation has significantly risen. The advisory committee will continue to monitor the litigation and evaluate the need for any appropriate rule changes.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Rules 6, 27, and 45, and a new Rule 5.1 with a recommendation that they be published for public comment. The advisory committee also proposed a style revision of Rules 1-15 with a recommendation that they be published for public comment but at a later date. At its last meeting, the Committee approved publishing for comment proposed amendments to Admiralty Rules B and C.

Proposed new Rule 5.1 requires a party to notify the appropriate federal or state government official if a filed pleading, motion, or other paper draws into question the constitutionality of a federal or state statute. The notice requirement supplements the court's duty under 28 U.S.C. § 2403 to notify the appropriate government official of a constitutional challenge to a statute. The new rule replaces the final three sentences of Rule 24(c), which sets out the court's notification duty and urges a challenging party to call the court's attention to the court's duty.

The proposed amendment to Rule 6 clarifies the method of counting the additional three days provided to respond if service is by mail or by one of the methods prescribed in Rule 5(b)(2)(C) or (D). The counting of the three days commences after the prescribed period to respond expires.

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

Rule 45(a)(2) would be amended to require that the subpoena served on a deponent state the method for recording testimony. Although Rule 30(b)(2) directs that notice of a deposition state the manner by which the testimony will be recorded, the notice is served on the parties and

not necessarily on a non-party deponent. Under rare circumstances, a deponent may have good reasons to seek a protective order with regard to the manner of recording. The advance notice required by the amendment would eliminate delay caused by a deponent seeking a protective order restricting the manner of recording.

The Committee approved the advisory committee's recommendations to publish the proposed rules amendments to the bench and bar for comment, along with the Admiralty Rules amendments described in the Committee's March 2003 report to the Judicial Conference.

Informational Items

The advisory committee has embarked on a multi-year, comprehensive "style" revision aimed at clarifying and simplifying the existing language of the Civil Rules. The project follows the successful completion of the style revisions of the Federal Rules of Appellate Procedure and the Federal Rules of Criminal Procedure.

The advisory committee approved the "style" revision of Rules 1 through 15. The rules had undergone demanding scrutiny, first by noted academic scholars, then by a leading legal writing expert, and later by the Committee's Subcommittee on Style, composed of federal judges and an academic assisted by consultants, before the revisions were forwarded to the advisory committee.

The advisory committee divided itself into two subcommittees, each with primary responsibility over half the group of rules. The subcommittees met in person to discuss each group of rules, and revised drafts were submitted to the advisory committee for its consideration in a plenary session.

The advisory committee addressed the appropriate scope of the project as a threshold issue. It decided not to propose substantive changes as part of this comprehensive style revision for two principal reasons: (1) a multitude of small substantive changes would be difficult for the

bench and bar to digest, comment upon, and incorporate into practice; and (2) the advisory committee and the style project easily could become swamped were the committee forced to consider the merits of many substantive changes. Potentially desirable substantive changes that emerge from style deliberations are directed to the regular agenda for separate consideration as opportunities arise.

After approving the recommended style revision of Rules 1-15, the advisory committee agreed that it was best to defer publishing them for public comment until a later time when work on the next group of rules can be completed and a greater number of rules can be aggregated and published at a single time.

The Committee approved the proposed amendments to Rules 1-15 to be published at a later date to the bench and bar for comment.

The advisory committee's subcommittees met or held conference calls during the past six months to study issues arising from discovery of computer-based documents, sealing of filed settlement orders, outstanding issues remaining from the committee's work on class-action reform, and a new civil forfeiture rule.

The Discovery Subcommittee identified several discrete electronic-discovery topics that it will present to the advisory committee next fall by way of draft rule amendments.

The Forfeiture Subcommittee conducted several lengthy conference calls as the first step in working on a draft Admiralty Rule "G" proposed by the Department of Justice to consolidate and expand the procedures for civil forfeiture now scattered throughout the Admiralty Rules.

The Federal Judicial Center is conducting research at the advisory committee's request on sealing orders and selection of class-action forums. The Center presented the advisory committee with preliminary findings on the number of settlements filed under seal. It also

reported its progress on a national survey of lawyers' predispositions to file class-actions either in federal courts or state courts.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to to Rules 35, 41, and the Rules Governing § 2254 Cases and § 2255 Proceedings and accompanying forms with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments to Rule 35 were published for public comment in August 2001, and the amendments to Rule 41 and the § 2254 and § 2255 Rules and accompanying forms were published for public comment in August 2002. Neither public hearing scheduled for the proposed amendments was held because no one requested to testify.

The proposed amendments to Rule 35 define "sentencing" as used in the rule to mean the "oral announcement of the sentence" for purposes of correcting a sentence. The clarification eliminates the potential ambiguity in the meaning of "sentencing," which triggers the seven-day period for making corrections in a sentence. The advisory committee originally proposed to define "sentencing" to be the "entry of judgment," which triggers many other time periods in the appellate rules. But the advisory committee agreed with the weight of the public comments that "oral announcement of sentencing" is preferable.

Defining "sentencing" to mean the "oral announcement of the sentence" represents the majority view of the courts of appeals addressing the issue. The advisory committee determined that there likely would be less confusion generated if the majority view were adopted. More practitioners are accustomed to computing their time to file a Rule 35 motion from the "oral announcement of the sentence" than from the "entry of judgment." Furthermore, the entry of judgment may be delayed for substantial periods of time for any number of reasons. Defining

"sentencing" to mean oral announcement of sentence would not expand the time during which a court could change the sentence, as it might be if the time period were to be triggered by the entry of judgment. The advisory committee concluded that the interests of finality would be better served by setting the triggering event as the "oral announcement of the sentence."

Proposed amendments to Rule 41 set out procedures governing the issuance of a tracking-device warrant and the comprehensive revision of the Rules Governing § 2254 Cases and § 2255 Proceedings conform to recent legislation and reflect the best practices of the courts.

The Committee approved the proposed amendments to Rule 41 for transmission to the Judicial Conference. The amendments would provide guidance, now found only in the case law, to judges issuing tracking-device warrants. Following the meeting, the Deputy Attorney General, who abstained from the vote, requested the Committee to defer transmitting them. In light of the Deputy's concerns and because the Department of Justice itself originally proposed the rule changes, the Committee decided to defer transmitting the proposed amendments. The deferral would allow the Department of Justice to present its concerns for the Committee's consideration.

The Rules Governing § 2254 Cases and § 2255 Proceedings are amended not only to conform to the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. Law No. 104-132) (AEDPA) and best practices of the courts but also to improve their clarity, consistent with the recent comprehensive style revision of the Federal Rules of Criminal Procedure. Many of the § 2254 Rules are similar or identical to the § 2255 Rules. Although the advisory committee initially pursued a proposal to consolidate both sets of rules, it ultimately declined to do so because consolidation raised too many problems.

The proposed amendments to Rules 1, 10, and 11 of the § 2254 Rules and Rules 1, 10, 11, and 12 of the § 2255 Rules are stylistic only. The proposed amendments to the remaining rules include more substantive changes noted below.

The proposed amendments to Rules 2 of the § 2254 and § 2255 Rules remove the existing requirement in the rules that the petition or motion be signed by the petitioner. The amendments would allow others authorized by law to sign the petition or motion on behalf of the petitioner or movant, e.g., "next friend," to do so. The proposed amendments also eliminate the authority of a clerk of court to return an insufficient petition or motion. Related amendments to Rules 3 of the § 2254 and § 2255 Rules would explicitly require the clerk to accept the filings.

Under the proposed amendments to Rules 3 of the § 2254 and § 2255 Rules, the clerk must file the petition or motion, consistent with Rule 5(e) of the Federal Rules of Civil Procedure, regardless of whether it fails to comply with these rules or local rules. Only a judge should refuse to accept a petition for filing, because the consequences of a late filing have become more serious in light of AEDPA's one-year statute of limitations. The proposed amendments also add a provision referring to the statutory one-year limitations that applies to a petition or motion filed under these rules. The Committee Note observes that the rule does not refer to the equitable tolling of a statute of limitation, but recognizes that every circuit addressing the issue has ruled that equitable tolling is available in appropriate circumstances.

Rule 4 of the § 2254 Rules would be amended to eliminate the requirement that the clerk of court serve a copy of the petition only by certified mail. The other methods of service authorized by Civil Rule 5 may be used. The amendments would also allow service on appropriate state officers instead of limiting service to the state attorney general alone. Under the proposed amendments to Rules 4 of the § 2254 and § 2255 Rules, a respondent may respond to a § 2254 petition or § 2255 motion not only by an answer or other pleading, but also by motion, including a motion to dismiss.

Rule 5 of the § 2254 Rules would be amended to require that the respondent state whether any claim of the petitioner is barred by a failure to exhaust state remedies, a procedural bar, non-

retroactivity, or a statute of limitations. It is also amended to require the respondent to provide the court with copies of any brief filed by the prosecution in the appellate court and the appellate court's opinions and dispositive orders relating to the conviction or sentence. The proposed amendments to Rules 5 of § 2254 Rules and § 2255 Rules adopt the practices of jurisdictions that explicitly provide an opportunity for the petitioner or movant to file a "reply" to the respondent's answer within a time fixed by the judge. The rules use the general term "reply" to refer to a petitioner's or movant's response to the answer, instead of the term "traverse."

The proposed amendments to Rules 6 of the § 2254 and § 2255 Rules add the requirement that the parties must provide reasons for requested discovery. Any proposed interrogatory and request for admission must accompany the discovery request, which must also specify any requested documents. These proposed changes reflect common practice in the courts.

Rules 7 of the § 2254 and § 2255 Rules clarify the authority of a judge to direct parties to submit to the court materials to assist it in its deliberations. The existing rules may be read narrowly to limit the court's authority to request only certain information in the record.

Under the proposed amendments to Rules 8 of the § 2254 and § 2255 Rules, a copy of the magistrate judge's findings may be delivered to all parties not only by mail, as required under the present rules, but also by any of the Civil Rule 5(b) service methods.

Rules 9 of the § 2254 and § 2255 Rules delete the provisions governing the dismissal of delayed § 2254 petitions or § 2255 motions. The AEDPA's one-year statute of limitations renders the provision unnecessary and potentially confusing. The amendments also reflect the requirement in the AEDPA that the petitioner or movant obtain approval from the appropriate court of appeals authorizing the district court to consider a second or successive petition or motion.

The proposed comprehensive revision of the model forms for filing a § 2254 petition or a § 2255 motion simplify the language and reflect the amendments proposed to the § 2254 and § 2255 Rules, including provisions conforming to the AEDPA. The revisions specifically refer to the one-year statute of limitations and require that all grounds of relief be stated in the forms. Space is provided for reasons explaining an untimely filing.

The revised forms omit the illustrative lists of the most frequently cited grounds for relief in § 2254 cases and § 2255 proceedings. Some members of the advisory committee believed that the lists were useful, because they might narrow the issues presented to the court by focusing the petitioner's or movant's attention on discrete, articulable issues. But a majority of the advisory committee concluded that the lists were not particularly helpful and encouraged unsupported allegations. Moreover, no list could be comprehensive.

The advisory committee believed that requesting in the forms information regarding an earlier motion, petition, or other application concerning the judgment of conviction is essential to the efficient handling of petitions and motions under the § 2254 and § 2255 Rules. Many petitions or motions filed under the § 2254 and § 2255 Rules are quickly disposed of because they do not comply with AEDPA's requirements. Absent the requested information, the respondent and the court could waste time and energy exploring the merits of the claims that would ultimately be barred by AEDPA. The advisory committee did not agree that providing this information would shift the burden to demonstrate an affirmative defense from the respondent to the petitioner or movant.

The revised forms may be signed by a person other than the petitioner or movant when authorized by law. The "in forma pauperis" declaration relieving the petitioner or movant of paying the $5 filing fee is left intact. The advisory committee determined that expanding the

form to require more information than the proposed forms do would be counterproductive and unreasonable.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rule 35 and the Rules Governing § 2254 Cases and § 2255 Proceedings and accompanying forms and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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

Approved for Publication and Comment

The advisory committee proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59 with a recommendation that they be published for public comment.

The proposed amendments to Rule 12.2 authorize a court to exclude certain expert evidence that had not been timely disclosed in accordance with the rule's disclosure requirements.

The amendments to Rules 29, 33, and 34 would permit a court to extend the time of filing of the designated motion even if the court rules on the matter after the expiration of the specified seven days, so long as the motion to extend was timely filed within the seven-day period. Rule 45, which deals generally with extensions of time, would be amended to be consistent with the proposed amendments to Rules 29, 33, and 34.

The proposed amendments to Rule 32 extend allocution at sentencing to victims of a felony offense not involving violence or sexual abuse. Under the existing rule, only a victim of a crime of violence or sexual abuse is entitled to address the court at sentencing. The amendments provide the court with discretion to limit the number of victims who may address the court at sentencing in cases involving multiple victims.

Rule 32.1 would be amended to specifically provide a person with an opportunity to make a statement in mitigation upon resentencing in a proceeding revoking probation or supervised release or modifying the conditions of probation or supervised release.

New Rule 59 creates a procedure for a district judge to review nondispositive and dispositive decisions by a magistrate judge. Under the amendments, a party waives its right to review of a magistrate judge's decision unless the party timely files objections with the district judge. The district judge retains the authority, however, to review a magistrate judge's decision even if an objection had not been timely filed. The procedures are based on 28 U.S.C. § 636 and are derived in part from Federal Rule of Civil Procedure 72.

The Committee approved the recommendations of the advisory committee to publish the proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59 to the bench and bar for comment.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 804(b)(3) with a recommendation that it be approved and transmitted to the Judicial Conference. The amendment to Rule 804(b)(3) was published for public comment in August 2002. A public hearing was held at which several witnesses testified.

The proposed amendment to Rule 804(b)(3) requires "particularized guarantees of trustworthiness" indicating the reliability of an unavailable witness's statement against penal interest *incriminating* an accused. The requirement mirrors the test applied by the Supreme Court in *Lilly v. Virginia,* 527 U.S. 116, 134-135 (1999). The amendment would maintain the longstanding "corroborating circumstances" requirement for a statement against penal interest of an unavailable witness *exculpating* an accused.

In *Lilly,* the Supreme Court held that statements against penal interest by unavailable witnesses incriminating an accused must bear "particularized guarantees of trustworthiness" because of the Confrontation Clause. But statements exculpating an accused do not implicate the Confrontation Clause. The advisory committee concluded that the "corroborating circumstances" standard, which has been significantly developed by case law over 30 years, should continue to apply to statements exculpating an accused. The Committee Note explains the distinction between the two standards.

The advisory committee recognized that the difference between the two standards is not sharply defined. Although there is substantial case law explaining what is meant by "corroborating circumstances" supporting a hearsay statement exculpating an accused, the precise extent of "particularized guarantees of trustworthiness" required to support a hearsay statement incriminating an accused is subject to developing case law. The Committee Note is intended to provide as much guidance as is possible to the bench and bar to understand the differences between the two standards. The Note points out the factors to be considered under each standard.

The advisory committee withdrew its proposed amendments to extend the "corroborating circumstances" standard to statements against penal interest in civil cases. It determined that the change was not necessary and would be counterproductive.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendment to Evidence Rule 804(b)(3) and transmit it to the Supreme Court for its consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Evidence is in Appendix C with an excerpt from the advisory committee report.

RULES GOVERNING ATTORNEY CONDUCT

The Committee's Subcommittee on Rules Governing Attorney Conduct has monitored legislative developments and discussions on the attorney conduct rules among the Department of Justice, state court representatives, and the American Bar Association.

LOCAL RULES PROJECT

The report on the local rules project prepared by Professor Mary P. Squiers identifies individual rules that are potentially inconsistent or duplicative of national rules or federal law. The advisory committee reporters reviewed the report's findings and recommendations. The advisory committee reporters, Committee reporter, and advisory committee chairs are working with Professor Squiers to develop a consensus report. Individual letters to each district court will be drafted identifying specific problematic local rules.

LONG-RANGE PLANNING

The Committee was provided a report of the March 17, 2003, meeting of the Judicial Conference's committee chairs involved in long-range planning. The Committee made no changes to its long-range goals.

REPORT TO THE CHIEF JUSTICE

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

Respectfully Submitted,

Anthony J. Scirica

David M. Bernick
Charles J. Cooper
Sidney A. Fitzwater
Mary Kay Kane
Mark R. Kravitz
Patrick F. McCartan
J. Garvan Murtha
Larry D. Thompson
A. Wallace Tashima
Thomas W. Thrash
Charles Talley Wells

Appendix A — Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix B — Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix C — Proposed Amendments to the Federal Rules of Evidence
Appendix D — Report to the Chief Justice on Proposed Amendments Generating Controversy