Agenda F-18
Rules
September 2002

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 10-11, 2002. Members present at the meeting included Judge Anthony J. Scirica, Judge Michael Boudin, Judge A. Wallace Tashima, Judge Frank W. Bullock, Jr., Judge Thomas W. Thrash, Judge J. Garvan Murtha, Chief Justice Charles Talley Wells, David M. Bernick, Esquire, Mark R. Kravitz, Esquire, Patrick F. McCartan, Esquire, Charles J. Cooper, Esquire, and Dean Mary Kay Kane.

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, Judge Lee H. Rosenthal, member, Professor Edward H. Cooper, reporter, and Professor Richard L. Marcus, special consultant, of the Advisory Committee on Civil Rules; Judge David G. Trager and Judge Tommy E. Miller on behalf of Judge Edward E. Carnes, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Milton I. Shadur, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative

Office's Rules Committee Support Office; Jeffrey A. Hennemuth, Nancy Miller, Patricia Ketchum, and James Ishida of the Administrative Office; Joseph Cecil and Thomas Willging of the Federal Judicial Center; Mary P. Squiers, Director of the Local Rules Project; and Professor Geoffrey C. Hazard, Professor R. Joseph Kimble, and Joseph F. Spaniol, consultants to the Committee.

FEDERAL RULES OF APPELLATE PROCEDURE

Forms Revision Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules recommended that the outdated references to the last century in four of the five forms in the appendix to the Appellate Rules be updated. The proposed revisions would substitute references to "20__" for "19__" in Forms 1, 2, 3, and 5. The advisory committee concluded that neither public notice nor comment is appropriate or necessary because the proposals are purely technical and do not substantively change the forms.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed revisions to Forms 1, 2, 3, and 5 in the Appendix to the Appellate Rules and transmit these changes 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.

Informational Items — En Banc Hearings and "Unpublished" Opinions

Rule 35(a) and 28 U.S.C. § 46(c) both require a vote of "[a] majority of the circuit judges who are in regular active service" to hear a case en banc. A three-way split among the courts of appeals has developed over the question whether judges who are disqualified are counted in calculating what constitutes a "majority." The advisory committee is considering whether the existing different practices should continue among the circuits despite a national statute and national rule addressing it.

The Department of Justice proposed a new rule that would explicitly permit citation to "unpublished" opinions under certain limited circumstances. Most of the courts of appeals have a local rule governing citation to unpublished or non-precedential opinions. Three circuits generally forbid citation, except under very limited circumstances. The others permit citation under varying conditions. As with the en banc hearing issue, the advisory committee will be considering whether it is appropriate to continue the existing different practices among the circuits.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1007, 2003, 2009, 2016, and new Rule 7007.1 and amendments to Official Forms 1, 5, and 17 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments and new rule were circulated to the bench and bar for comment in August 2001. The scheduled January 2002 public hearing was canceled because no one requested to testify.

The advisory committee also submitted proposed amendments to Rules 1005, 1007, and 2002, and revisions to Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19, which arose from recent related Judicial Conference action, with a recommendation that they be approved and transmitted to the Judicial Conference. These rules amendments and forms revisions are consistent with recommendations approved by the Judicial Conference that documents in bankruptcy cases should be made generally available electronically with the proviso that the "Bankruptcy Code and Rules should be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits" (JCUS-SEP 01, p. 50). The amendments were circulated to the bench and bar for comment in January 2002. The scheduled April 2002 public hearing was canceled because no one requested to testify. The

advisory committee, however, held a meeting of selected experts and experienced lawyers and discussed the issues arising from the proposals.

The proposed amendment to Rule 1007(a) (Lists, Schedules, and Statements; Time Limits) requires a corporate debtor at the beginning of a case to disclose information regarding its owners, if the owners also are corporations, to assist a judge in making judicial disqualification decisions.

The proposed amendments to Rule 2003 (Meeting of Creditors or Equity Security Holders) and Rule 2009 (Trustees for Estates When Joint Administration Ordered) reflect the enactment of a new subchapter V of chapter 7 of the Bankruptcy Code, which makes multilateral clearing organizations eligible for bankruptcy relief and authorizes the Federal Reserve Board to designate the trustee or alternative trustees for the case.

Rule 2016 (Compensation for Services Rendered and Reimbursement of Expenses) would be amended to implement amendments made to 11 U.S.C. § 110(h)(1) governing disclosure of compensation paid to a bankruptcy petition preparer.

New Rule 7007.1 (Corporate Ownership Statement) would require parties in adversary proceedings to disclose corporate entities that own 10% or more of the stock of the party to provide the court with some of the information necessary to make judicial disqualification decisions. It is modeled on similar disclosure provisions in the Appellate, Civil, and Criminal Rules.

Official Form 1 (Voluntary Petition) would be revised to add a check box for designating a clearing-bank case filed under subchapter V of chapter 7 of the Bankruptcy Code. Official Form 5 (Involuntary Petition) and Official Form 17 (Notice of Appeal) would be revised to give notice to child-support creditors and their representatives that no filing fee is imposed for either type of action if the statutory form detailing the child-support debt is also filed.

Rules 1005, 1007 (c) and (f), and 2002 would be amended to implement the recently adopted Judicial Conference policy protecting the privacy of debtors filing for relief. The advisory committee received considerable comment on the amendment originally proposed to Rule 1005 that would have restricted the debtor's social security number on the caption of the petition to the last four digits. The number of persons bearing the same surname, first name, and last four digits of a social security number is significant. Organizations that search large databases that depend on accurate identifications of individuals objected to the proposal because it would likely result in misidentifications, requiring them to develop costly alternative and redundant means of identification.

The Department of Justice, Department of the Treasury, and Internal Revenue Service asserted that the proposal would hamper criminal investigations in a wide range of criminal activity, including investigations of individuals who use false social security numbers. The institutional private creditors were concerned that the greater likelihood of misidentification could lead to inadvertent violations of the automatic stay and the discharge injunction, which would adversely affect their business. Credit reporting agencies also objected to the proposal because it would eliminate a primary source of information.

The advisory committee concluded that creditors were entitled to receive the debtor's full social security number. Law enforcement agencies could also obtain access to the full social security number from creditors, the trustee, and by application to the bankruptcy court. But consistent with the Judicial Conference policy protecting a debtor's privacy, the committee decided to limit the disclosure of the full social security number to the general public.

Rule 1005 (Caption of Petition) requires a debtor to list all names used in the six years preceding the petition's filing. The proposed amendments require the debtor to include in the

caption appropriate numerical identifiers, except that only the last four digits of the social security number may be used. This will permit creditors who have the debtor's social security number to conduct an electronic search with that information.

Rule 1007(c) and (f) (Lists, Schedules, and Statements; Time Limits) would be amended to require a debtor to submit a verified statement of the debtor's full social security number. The statement would be submitted to the clerk of court, but it would not be filed in the case nor become a part of the case file that would be available to the public either through Internet access or by a search of the paper records at the court.

Rule 2002 (Notices to Creditors, Equity Security Holders, United States, and United States Trustee) would be amended to require the clerk of court to include a debtor's full social security number on the § 341 notice sent to creditors. The full number would be included only on the notices sent to the creditors and not on the copy of the notice that becomes part of the court record.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 1005, 1007, 2002, 2003, 2009, 2016, and new Rule 7007.1 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 revisions of Bankruptcy Official Forms 1, 5, and 17 conform to statutory changes concerning multilateral clearing banks and child-support creditors. Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19 would also be amended to implement the privacy-related amendments to Rules 1005, 1007, and 2002 by restricting the display of a debtor's social security number to the last four digits. In addition, the revisions add an explicit reference to § 110 of the Bankruptcy Code, which continues to require the disclosure of the full social security number of a bankruptcy petition preparer.

Recommendation: That the Judicial Conference:

(a) approve the proposed revisions to Bankruptcy Official Forms 1, 5, and 17 relating to multilateral clearing banks and child-support creditors to take effect on December 1, 2002; and

(b) approve the proposed privacy-related revisions to Bankruptcy Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, 17, and 19 to take effect on December 1, 2003.

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

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rule 9014 (Contested Matters) with a recommendation that they be published for comment. The proposed amendments limit the applicability of the mandatory disclosure provisions of Rule 26 of the Federal Rules of Civil Procedure in contested matters, which typically are resolved quickly, rendering the mandatory disclosure provisions ineffective. The mandatory disclosure provisions continue to apply to adversary proceedings.

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

Informational Item

In September 2001, the advisory committee withdrew its proposed amendment to Rule 2014, which would have modified the disclosure requirements of a professional seeking employment in a bankruptcy case. After considerable discussion and effort to accommodate competing interests, the committee decided to table the proposal.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 23, 51, 53, 54, and 71A with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2001. Public hearings were held on the proposed amendments in San Francisco, California, and Washington, D.C. More than 40 witnesses testified at the hearings. The advisory committee also sponsored a conference at the University of Chicago Law School on proposed amendments to Rule 23. In addition to the published amendments, the conference addressed preliminary proposals dealing with overlapping and competing class actions filed in state courts.

RULE 23 (CLASS ACTIONS)

Over the last ten years, the advisory committee has undertaken an intensive consideration and review of Rule 23, the class-action rule. This ongoing review by the advisory committee is the first review of Rule 23 following the thorough reworking of the Rule in amendments made in 1966. But in the now almost 40 years since that time, Rule 23 has figured prominently in the explosive growth of large-scale group litigation in federal and state courts, and has both shaped and — in its interpretation and application — been shaped by revolutionary developments in modern complex litigation. The drafters of the 1966 amendments knew that after some appropriate period of time it would be important to reconsider what they had done.

The present set of proposed amendments takes account of continuing rapid changes in Rule 23 practice and focuses on the persistent problem areas in the conduct of class suits. The proposals focus on class-action procedures rather than on substantive certification standards. The overall goal of the advisory committee has been to develop rule amendments that provide the district courts with the tools, authority, and discretion to closely supervise class-action litigation.

The advisory committee had before it an unusually rich record concerning the operation of Rule 23, including the voluminous record generated in the public comments on the proposed revisions to Rule 23 in 1996; the Federal Judicial Center's 1996 empirical study of federal class action suits; the RAND Institute for Civil Justice's publication in 2000 of *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, analyzing the results of detailed case studies and surveys of lawyers engaged in class-action litigation in state and federal courts; and the extensive materials assembled by the Working Group on Mass Torts, including the 1999 *Report on Mass Tort Litigation*. In addition to these sources, the advisory committee obtained practical insight by consulting with a number of experienced class-action practitioners who represent all major points of view. Taken as a whole, the package is a balanced and neutral attempt to protect individual class members, enhance judicial oversight and discretion, and further the overall goals of the class-action device — efficiency, uniform treatment of like cases, and access to court for claims that cannot be litigated individually without sacrificing procedural fairness or bringing about other undesirable results.

The proposed amendments focus on four areas: the timing of the certification decision and notice; judicial oversight of settlements; attorney appointment; and attorney compensation.

Rule 23(c)(1)(A): The Timing of Certification

In 1996, the advisory committee published a package of proposed amendments to Rule 23 dealing with class certification for comment. Included was a proposed amendment to Rule 23(c)(1) that would change the requirement that a certification decision be made "as soon as practicable" into a requirement that the decision be made "when practicable." Although public comment was largely favorable, the Standing Rules Committee declined to approve the amendment on two grounds. The first was that it would be better to consider all Rule 23 changes in a single package, the consideration of which had been deferred in anticipation of the Supreme

Court's pending decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The second was concern that the change in wording would encourage courts to delay deciding certification motions, leading to an unwarranted increase in precertification discovery into the merits of a class suit.

Amended Rule 23(c)(1)(A) recommends a new variation on the "when practicable" language, calling for a certification determination "at an early practicable time." The Committee Notes address the concerns previously identified. The proposed language is consistent with present good practices. Courts generally make certification decisions only after the deliberation required for a sound decision, as shown by Federal Judicial Center statistics on the time from filing to decision of certification motions. Courts decide certification motions promptly, but only after receiving the information necessary to decide whether certification should be granted or denied and how to define the class if certification is granted. The Committee Notes clearly state that the amended language is not intended to permit undue delay or permit extensive discovery unrelated to certification.

The proposed amendment at first reading may seem a matter of semantics. In fact, it authorizes the more flexible approach many courts take to class-action litigation, recognizing the important consequences to the parties of the court's decision on certification. The current rule's emphasis on dispatch in making the certification decision has, in some circumstances, led courts to believe that they are overly constrained in the period before certification. A certain amount of discovery may be appropriate during this period to illuminate issues bearing on certification, including the nature of the issues that will be tried; whether the evidence on the merits is common to the members of the proposed class; whether the issues are susceptible to class-wide proof; and what trial-management problems the case will present.

The proposed language is consistent with the practice of authorizing discovery on the nature of the merits issues, which may be necessary for certification decisions, while postponing discovery pertaining to the probable outcome on the merits until after the certification decision has been made. As the Committee Notes discuss, certification discovery need not concern the weight of the merits or the strength of the evidence. By making it clear that the timing of a certification decision, and related discovery, is limited to that necessary to determine certification issues, the amended Rule and Note give courts and lawyers guidance lacking in the present rule. The proposed amendment brings the present rule into conformity with the approach taken by experienced judicial officers. The relatively extensive public comment on this proposal was generally favorable.

Rule 23(c)(1)(B): The Order Certifying a Class

Proposed Rule 23(c)(1)(B) specifies the contents of an order certifying a class action. Such a requirement facilitates application of the interlocutory-appeal provision of Rule 23(f) by requiring that a court must define the class it is certifying and identify the class claims, issues, and defenses. The proposed amendment also requires that the order appoint class counsel under Rule 23(g).

Rule 23(c)(1)(C): The Conditional Nature of Class Certification

Under proposed Rule 23(c)(1)(C) an order granting or denying class certification may be amended at any time up to "final judgment"; the current rule terminates the power at "the decision on the merits," an event that may happen before final judgment. This change avoids possible ambiguity in the reference to "the decision on the merits," which may apply, for example, to a determination of liability made *before* final disposition. Later proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. Rule 23(c)(1)(C) would also be amended to delete the provision for conditional class

certification. The provision for conditional class certification is deleted to avoid the unintended suggestion, which some courts have adopted, that class certification may be granted on a tentative basis, even if it is unclear that the rule requirements are satisfied. The court's power to later redefine or decertify the class is left undisturbed.

Rule 23(c)(2): Notice

Amended Rule 23(c)(2)(A) would recognize the court's authority to direct "appropriate" notice in (b)(1) and (b)(2) class actions. Members of classes certified under (b)(1) or (b)(2) have interests that may deserve protection by notice. Notice to such classes, as compared with (b)(3) classes, is intended to serve more limited, but important, interests, such as the interest in monitoring the conduct of the action. The advisory committee, however, was sensitive to the concern that mandating notice in all (b)(1) and (b)(2) actions could overwhelm a public-interest group seeking class-action relief with only modest resources. In response to public comment from members of the civil rights bar, the advisory committee revised the language — which had been mandatory — to place the giving of notice in (b)(1) and (b)(2) actions within the district court's discretion. The Committee Note expressly cautions courts to exercise the authority to direct notice in these actions with care. The court retains the discretion not to direct any type of notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice in the particular case. If the court decides that notice is appropriate, it also need not require notice to be made in the same manner as in a (b)(3) action by individual notice, because there is no right to request exclusion from (b)(1) and (b)(2) classes.

Proposed new Rule 23(c)(2)(B) carries forward the present notice requirement for (b)(3) class actions. It requires what the cases now treat as aspirational: class-action notices are to be in "plain, easily understood language."

Rule 23(e): Settlement Review

The need for improved judicial review of proposed class settlements, along with the abuses that can result without effective judicial review, was a recurring theme in the testimony and written statements submitted to the advisory committee during public comment on the 1996 rule proposals. The RAND study also called for closer judicial review of class-action settlements. The proposed amendments focus on strengthening the rule provisions governing the process of reviewing and approving proposed class settlements in a setting that often lacks the illumination brought by an adversary process.

New Rule 23(e)(1)(A) would limit the requirement of court approval of any settlement, voluntary dismissal, or compromise of a class claim to cases in which a class has been certified. Approval is not required if class allegations are withdrawn as part of a disposition reached before a class is certified since putative class members are not bound by the settlement.

New Rule 23(e)(1)(B) would require notice of a proposed settlement, but only when class members would be bound by the settlement. The notice is to issue to the class in a "reasonable" manner; individual notice is not required in all classes or all settlements.

New Rule 23(e)(1)(C) would adopt an explicit standard for approving a settlement for a class: the proposed settlement must be "fair, reasonable, and adequate." This is the standard that has been stated in the case law. The district court must also make findings to support the conclusion that the settlement meets this standard.

New Rule 23(e)(2) would require the parties to file a statement identifying any agreement made in connection with a settlement. Such "side agreements" can be important to understanding the terms the parties and counsel have agreed to, but sometimes are not disclosed to the court. There is concern that some side agreements may influence the terms of settlement by trading away possible advantages for the class in return for advantages for others.

The disclosure of side agreements, however, should not automatically become the occasion for discovery by the parties. Nonetheless, a court can direct a party to provide to the court or to the other parties (with appropriate confidentiality safeguards) a copy of the full terms of any agreement identified by any party as made in connection with the settlement.

Rule 23(e)(3): Second Opt-Out Opportunity

New Rule 23(e)(3) would establish authority to permit a second opportunity to opt out of a (b)(3) class if settlement is proposed after expiration of the original opportunity to request exclusion. There is no presumption that a second opt-out opportunity should be afforded. That question is left entirely to the court's discretion. This provision would enhance judicial discretion to provide the same ability to opt out with knowledge of the settlement terms that is enjoyed by members of the many (b)(3) classes that are considered for certification — and thus afford a right to request exclusion — after a settlement has been reached.

When a case is certified for trial before settlement has been reached, the decision whether to opt out may be made well before the nature and scope of liability and damages are understood. Settlement may be reached only after the opportunity to request exclusion has expired, and after great changes in class members' circumstances and other aspects of the litigation. The proposal permits the court to refuse to approve a settlement unless it affords a new opportunity to request exclusion, at a time when class members can make an informed decision based on the proposed settlement terms. In appropriate cases, the court can establish an opportunity to opt out that is as meaningful as the opportunity afforded in the many cases that now reach settlement before certification is ordered. And at a more basic level, the second opt-out opportunity gives class members the same opportunity to accept or reject a proposed settlement as persons enjoy in individual law suits.

This proposal introduces a measure of class-member self-determination and control that best harmonizes the class action with traditional litigation. The presumption of consent that follows a failure to affirmatively opt out at the time of certification may lose its footing when circumstances have changed materially from the time when the class action is finally settled. In these cases, a second opt-out opportunity could relieve individuals from the unforeseen consequences of inaction or decisions made at the time of certification, when limited meaningful information was available. The proposed second opt-out opportunity may provide added assurance to the supervising court that a settlement is fair, reasonable, and adequate. It is just the sort of "structural assurance of fairness," mentioned in *Amchem Products Inc.*, that permits class actions in the first place.

The proposal will only make a difference in cases in which the class is certified and the initial opt-out period expires before a settlement agreement is reached. It is irrelevant in those cases in which a settlement agreement is submitted to the court simultaneously with a request that a class be certified. Even when applicable, however, a court may decide that the circumstances make providing a second opportunity to request exclusion inadvisable. The case may have been litigated to a stage that makes it similar to a fully tried suit and that reduces the need for a second opportunity to opt out. There may not have been a significant change in circumstances or lapse in time between the initial opt-out opportunity and the settlement. There may be other circumstances that make the additional opt-out opportunity inadvisable. Accordingly, the amendments provide a court with broad discretion to assess and determine whether in the particular circumstances a second opt-out opportunity is warranted before approving a settlement.

The advisory committee received several comments on this proposal. It is fair to say that the comments, whether favorable or unfavorable, do not line up by plaintiffs and defendants.

Some class-action plaintiffs' lawyers favor and some oppose the proposal. The same is true of the defense bar. Academic commentary has been favorable. District judge members of the advisory committee and of the Standing Rules Committee welcome the enhancement to their discretion.

The advisory committee carefully considered concerns that a second opt-out opportunity might inject additional uncertainty into settlement and create opportunities unrelated to the purpose of the second opt out, potentially defeating some settlements and making others more costly. Under this view, the proposal would create an opportunity for dissatisfied or mercenary counsel to woo class members away from the settlement with promises of a superior alternative settlement award. Balanced against these concerns is the fact that permission to opt out after a tentative settlement is reached is not novel in certain kinds of class-action litigation and generally has not been detrimental to these class-action settlements. Many cases settle before certification in the knowledge that class members must be given a first opportunity to opt out. And when settlements are reached after expiration of the original exclusion period, the terms — particularly in mass tort actions — often include a second opt-out opportunity. The possibility that "too many" class members may opt out during a second-opportunity stage, leaving a defendant with a less comprehensive settlement, is usually guarded against by including provisions in the settlement agreement allowing the parties to abandon the settlement if a pre-determined number or proportion of the class takes advantage of the second opt-out opportunity.

Although providing a second opt-out opportunity may change the dynamics of the negotiation process in some cases, the advisory committee is persuaded that ensuring the fairness of the process outweighs any potential efficiency loss and that provision of the opportunity in appropriate cases, in the court's discretion, will not be unduly disruptive to settlement. District

judges are by no means averse to class-action settlements, and they will apply their discretion to employ this new tool carefully.

New Rule 23(e)(4) would confirm the right of class members to object to a proposed settlement, and would require court approval for withdrawal of an objection.

Rule 23(g): Class Counsel Appointment

All recent examinations of class-action practice recognize the crucial significance of class counsel. But Rule 23 nowhere addresses the selection or responsibilities of class counsel. Until now, the adequacy of counsel has been considered only indirectly as part of the Rule 23(a)(4) determination whether the named class representatives will fairly and adequately protect the interests of the class. The proposed amendments build on experience under Rule 23(a)(4) and fill the gap by articulating the responsibility of class counsel and providing an appointment procedure.

Proposed paragraph (1)(A) recognizes the requirement that class counsel be appointed for each class that the court certifies, unless a statute such as the Private Securities Litigation Reform Act (Pub. Law No. 104-67) establishes different requirements.

Proposed paragraph (1)(B) states that class counsel "must fairly and adequately represent the interests of the class." The Committee Note discusses the distinctive role of class counsel, making it clear that the relationship between class counsel and individual class members, including the class representatives, is not the same as the one between a lawyer and an individual client. Appointment as class counsel entails special, paramount responsibilities to the class as a whole.

Proposed paragraph (1)(C) sets out the criteria that a court must consider in appointing class counsel, including the work counsel has performed in the action, counsel's experience in complex litigation and knowledge of the applicable law, and the resources counsel will commit

to the representation. Under the proposed amendments, a court may also direct potential class counsel to provide additional information to assist it in making the appointment decision, including the proposed terms of an attorney fee award. The provision encourages counsel and the court to reach early shared understandings about the basis on which fees will be sought. Such a provision has been encouraged by judges emphasizing the importance of judicial control over attorney fee awards. This feature might obviate later objections to the fee request, serve as a more productive way for the court to deal in advance with fee award matters that seem to defy regulation after the fact, and accommodate competing applications or innovative approaches when appropriate.

Proposed paragraph (2) sets out the appointment procedure for class counsel. Paragraph (2)(A) would point out that the court may appoint interim counsel during the precertification period as a case-management measure. Paragraph (2)(B) would recognize that the court's scrutiny of potential class counsel will differ depending on whether there are multiple applicants for the position. If there is one applicant, the court may make the appointment only if the applicant is adequate under the criteria identified in Rule 23(g)(1)(C). If there are multiple applicants, however, the court must appoint the applicant best able to represent the interests of the class. The proposed rule takes no position on auctions or similar judicial efforts to engender competition. The Note recognizes that one factor that may be important in selecting class counsel in the multiple-applicant situation is an existing attorney-client relationship between the class representative and counsel. Paragraph 2(C) would specifically authorize the court to include provisions regarding attorney fees in the order appointing class counsel.

The advisory committee made several adjustments to the proposal in response to public comment. Most of the changes clarified the difference between the situation in which no

applicant applies for appointment and the situation in which several lawyers or firms seek apointment.

Rule 23(h): Attorney Fees

Attorney fees play a prominent role in class-action practice and are the focus of much of the concern about class actions. The award of large attorney fees in the absence of meaningful recoveries by class members in some class actions brings the civil justice system into disrepute. Courts have increasingly assumed significant responsibility for determining attorney's fees, rather than simply accepting previously negotiated arrangements. They have also examined the actual benefits accruing to the class members as opposed to speculative estimates (such as coupon recoveries). But the Civil Rules themselves provide little guidance in this area, which may have contributed to some inconsistency in application. The only provisions on fee awards in the Civil Rules appear in Rule 54(d)(2), but that Rule is not tailored to the special features of class actions. The proposed amendment addresses notification to the class of a motion for award of fees, the rights of objectors, and the criteria to be considered in determining the amount of the fee award.

Under proposed subdivision (h), a court may award attorney fees in a class action only if authorized by law or the parties' agreement. The award must be "reasonable," and it is the court's duty to determine the reasonable amount. The proposed rule does not attempt to influence the ongoing case law development regarding a choice between (or combination of) the percentage and lodestar amounts. As emphasized in the Committee Note, because the class action is a creation of the court, the court has a special responsibility to monitor the attorney fee award, as it also does with regard to proposed settlements. The Note further recognizes the critical role of the court in ensuring that the class action achieved actual results for class members that warrant a substantial fee award.

Paragraph (1) would establish that the attorney fee motion is made under Rule 54(d)(2), "subject to the provisions of this subdivision, at a time set by the court." It is important to maintain the integration of all fee orders with the entry-of-judgment and appeal-time provisions of Civil Rule 58 and Appellate Rule 4, which — under amendments to take effect this December 1 — are explicitly integrated with Rule 54. But it also is important to recognize the distinctive features of class-action fee applications, particularly with respect to the appropriate time for a fee motion. Subdivision (h) would provide that a motion for fees must be made "at a time set by the court."

The proposed amendment also requires that notice regarding attorney fee motions by class counsel be directed to class members in a reasonable manner (similar to Rule 23(e) notice to the class of a proposed settlement). In a case in which settlement approval is contemplated, notice of class counsel's fee motion should be combined with notice of the proposed settlement. In an adjudicated case, the court may modify the notice to avoid undue expense.

Paragraph (2) would allow any class member or party from whom payment is sought to object to the attorney fee motion. The Committee Note points out that the court may direct discovery depending on the completeness of the material submitted in support of the fee motion, which depends in part on the applicable fee-measurement standard. The Note also makes clear that broad discovery is not normally approved in regard to fee motions.

Proposed paragraph (3) calls for findings under Rule 52(a) and authorizes the court to determine whether to hold a hearing on the motion. In settled class actions, the hearing might well be held in conjunction with proceedings under Rule 23(e), and in other situations there should be considerable flexibility in determining what suffices as a hearing. The findings requirement provides important support for meaningful appellate review. As under Rule 54(d)(2), the court can refer the motion to a special master or magistrate judge. The Committee

Note sets out the factors that courts have recently, and consistently, found important to consider in determining whether the fee sought is "reasonable." The Note attempts to identify the analytic framework for such determinations, recognizing that the case law will continue to develop and will have subtle variations from circuit to circuit. The factors discussed in the Note cut across different methods of determining the size of fee awards, such as percentage of fund or lodestar.

RULE 51 (INSTRUCTIONS TO JURY: OBJECTION)

The Rule 51 project began with a specific request from the Ninth Circuit Judicial Council. Reviewing local district rules, the Ninth Circuit found that many districts had rules that require submission of proposed jury instructions before trial begins. The Council was concerned that these rules may be invalid in light of Rule 51's provision for filing requests "[a]t the close of the evidence or at such earlier time *during trial* as the court reasonably directs." The proposed amendments expressly validate the practices of these courts. The proposed amendments also are designed to capture many of the interpretations of Rule 51 that have emerged in practice and remove traps for the unwary.

Proposed amendments to subdivision (a) govern requests regarding instructions to the jury. The revision recognizes a court's authority to direct that the requests be submitted before trial. But the amendment expressly allows a party to file a later request concerning issues that could not reasonably have been anticipated at the earlier time for requests set by the court. The court also may permit untimely requests on any issue.

The proposed amendments to subdivision (b) govern the instructions to the jury. Paragraph (1) requires the court to inform the parties of all instructions, not only action on requests, before instructing the jury and before jury arguments. Paragraph (2) makes explicit the parties' opportunity to object on the record to the proposed instructions. Paragraph (3) recognizes

the practice of instructing the jury "at any time after trial begins and before the jury is discharged."

Under the present Rule 51, a party who wants an issue covered by instructions must do both of two things: make a timely request, and then separately object to failure to give the request as made. The requirement that a request be renewed by an objection is all too often overlooked. These common failures arise in part from the ambiguous language of present Rule 51. The requirement, however, serves useful purposes. Courts of appeals have explained that repetition is useful, at times to ensure that the court had not simply forgotten the request or its intention to give the requested instruction, and at other times to show the court that it has failed in its attempt to give the substance of a requested instruction in better form. These purposes may be fully satisfied by means short of a renewed formal objection. Proposed new Rule 51(d)(1)(B) accommodates these interests by two steps. First, it makes clear that both request and objection are required. But then it also provides that a request suffices without a later objection if "the court made a definitive ruling on the record rejecting the request."

Many circuits recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is not reflected at all in the text of Rule 51, but is explicit in the general "plain errors" provision of Criminal Rule 52. The contrast between Criminal Rule 52 and Rule 51 has led some circuits to reject the plain-error doctrine for civil jury instructions. Rule 51(d)(2) would be revised to adopt a plain-error provision parallel to the approach taken in Criminal Rule 52(b).

Rule 53 (Masters)

The Rule 53 project began several years ago, prompted by observations addressed to the advisory committee by two local district-court committees formed to develop Civil Justice Reform Act plans. In working through the Civil Rules, these committees observed that Rule 53

does not describe the uses of special masters that have grown up over the years. Present Rule 53 addresses only trial masters who hear trial testimony and report recommended findings. The Supreme Court has severely limited resort to trial masters. But masters have come to be used increasingly for pretrial and post-trial purposes. A study by the Federal Judicial Center confirmed the belief that masters are frequently appointed for pretrial and post-trial duties. The proposed amendment is designed to reflect contemporary practice, and to establish a framework to regularize the practice.

In general, proposed new Rule 53 brings pretrial and post-trial masters expressly into the rule, establishing the standard for appointment. It carries forward the demanding standard established by the Supreme Court for appointment of trial masters, and eliminates trial masters from jury-tried cases except upon consent of the parties. The rule establishes that a master's findings or recommendations for findings of fact are reviewed de novo by the court, with limited exceptions adopted with the parties' consent and the court's approval.

Rule 53(a)(1)(B) would continue to limit the use of trial masters to actions to be tried to the court without a jury when some "exceptional condition" warrants it or when there is need to perform an accounting or resolve difficult computations. But the present provision for appointment of a trial master in a jury trial is deleted, except when a statute provides otherwise or with the consent of the parties. Deleting the provision for use of a trial master in a jury trial does not foreclose other means of providing neutral assistance to a jury in a complex case, such as by a court appointment of an expert witness under Federal Rule of Evidence 706. Some courts have found it possible to combine the functions of master and court-appointed expert in various ways. Appointment as an expert witness ensures that the jury is informed, through examination and cross-examination, of the grounds for the expert's recommended conclusions and preserves procedural fairness.

Paragraph (1)(C) would expressly authorize a court to appoint a special master to handle pretrial and post-trial matters. The proposed amendment is not designed to encourage — nor, for that matter, to discourage — use of special masters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

Subdivision (b) would regularize the practice governing the appointment of a master. Parties are given the opportunity to be heard before the court appoints a master. The appointment order must state the master's duties, the circumstances — if any — when ex parte communications are permitted, the record to be maintained, the terms of compensation for the master, and the procedures and standards for reviewing the master's findings and recommendations.

Proposed Rule 53(g)(3) increases the court's responsibility for fact matters. It requires de novo determination of objections to fact findings unless the parties stipulate with the court's consent that review is for clear error, or that the findings of a master appointed by consent or for pretrial or post-trial duties will be final. The Committee Note adds a reminder that the court may determine fact issues de novo even if no party objects. The changes are consistent with several appellate decisions that reflect substantial reservations about the authority of an Article III judge to delegate responsibility to a master. A master's conclusions of law will continue to be reviewed de novo by the court.

Subdivision (h) would set out the procedures governing the compensation of a master.

Proposed subdivision (i) carries forward the provisions of present Rule 53(f), stating that a magistrate judge is subject to Rule 53 only when the order referring a matter to the magistrate judge expressly provides that reference is made under Rule 53.

Technical and Conforming Amendments

The citations to Rule 53 contained in Rules 54(d) and 71A(h) would be changed to reflect the renumbered provisions in amended Rule 53.

The advisory committee also recommended that the outdated references to the last century in three forms in the appendix to the Civil Rules be updated. The proposed revisions would substitute references to "20__" for "19__" in Forms 19, 31, and 32. The advisory committee concluded that neither public notice nor comment is appropriate or necessary because the proposals are purely technical and do not substantively change the forms.

The Committee concurred with the advisory committee's recommendations. An excerpt from the advisory committee report describes the proposed amendments and is set out in Appendix B.

> **Recommendation**: That the Judicial Conference approve the proposed amendments to Civil Rules 23, 51, 53, 54, and 71A and the revisions to Forms 19, 31, and 32 and transmit these changes 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.

Informational Item — Duplicative and Competing Class Actions

The advisory committee has been told repeatedly in a variety of forums, by counsel for both defendants and plaintiffs, and without contradiction, that as Rule 23 is reformed to enhance judicial supervision of class counsel, the deliberateness of the certification decision, and the judicial review of settlements, an ever-growing number of cases will be filed in those state courts where this kind of supervision is perceived to be less demanding. This often results in multiple filings of multi-state diversity class actions in both federal and state courts. Yet this result is precisely the outcome that the class-action device was designed to prevent. The purpose of the class-action device is to eliminate repetitive litigation, promote judicial efficiency, permit small claims to find *a* forum, and achieve uniform results in similar cases. But duplicative class

litigation is destructive of just these goals. Multiple filings can threaten appropriate judicial supervision, damage the interests of class members, hurt conscientious class counsel, impose undue burdens of multiple litigation on defendants, and needlessly increase judicial workloads.

The problems generated by overlapping, duplicative, and competing class actions have commanded the attention of many observers. According to the American Law Institute's 1994 Complex Litigation Project, the problems caused by multiple class actions are so pressing that "[w]e are in urgent need of procedural reform to meet the exigencies of the complex litigation problem." "Repeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative image many people have of the legal system." American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* (1984-1994) at 9. Although the Federal Judicial Center's study focused on class-action dispositions in only four federal districts over a period of two years, it found several illustrations of unresolved duplicative filings. The RAND study confirmed the seriousness of the problem.

Legislative proposals to deal with overlapping actions have been pursued for several years. In March 1988, the Judicial Conference approved in principle creation of minimal-diversity federal jurisdiction to consolidate multiple litigation in state and federal courts involving personal injury and property damage arising out of a "single event" (JCUS-MAR 88, pp. 21-23). This position was confirmed in March 2001 when Director Mecham, on behalf of the Judicial Conference, advised Congress that the federal judiciary supported H.R. 860, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001" (107th Congress). In addition, the 1990 Report of the Federal Courts Study Committee, pp. 44-45, recommended that Congress "should create a special federal diversity jurisdiction, based on the minimal diversity

authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation."

Congress has considered many bills that would provide easier access to federal courts in class actions by initial filing or by removal from state courts. Most recently, the House of Representatives in 2002 passed one of these bills, H.R. 2341 (107th Congress). In 1999, the Judicial Conference, on the recommendation of the Committee on Federal-State Jurisdiction, opposed a bill whose core jurisdictional requirements were similar to H.R. 2341 (JCUS-MAR 99, pp. 16-17). Under the earlier bill, a class action could be filed in federal court or removed from state court to federal court if there were minimal diversity among the parties, i.e., at least one defendant and one plaintiff were from different states. The Conference opposed the bill, as drafted, "noting concerns that the provisions would add substantially to the workload of the federal courts and are inconsistent with principles of federalism." As drafted, the bill contained no effective limitation or threshold requirement on class actions that could be brought to federal court. Although the bill did not succeed in establishing a feasible mechanism to control the number of class actions potentially filed in or removed to federal courts, the problems identified in the bill are serious and persist.

One specific source of the concerns reflected in these legislative proposals has arisen from state-court filings on behalf of classes that include plaintiffs from other states. Many of these actions seek — and frequently obtain — certification of nationwide classes. Membership in these classes may overlap with classes sought — or actually certified — in other courts, state or federal. Pretrial preparations may overlap and duplicate, proliferating expense and forcing delay now in one proceeding, now in another, as coordination is worked through. Settlement negotiations in one action may be played off against negotiations in another, raising the fear of a "reverse auction" in which class representatives in one court accept terms less favorable to the

class in return for reaping the rewards that flow to successful class counsel. Moreover, the certification of nationwide or multi-state class actions in one state court poses a threat to the proper allocation of decisionmaking in a federal system. Individual state courts may properly apply the policy choices of the residents of that state to those residents. But local authorities ought not impose those local choices upon other states and certainly not on a nationwide basis.

One means of doing something about the problems created by overlapping class actions might be through new provisions in the Civil Rules. Serious objections, however, were made to draft rule amendments considered by the advisory committee. Both Enabling Act limits and Anti-Injunction Act limits were invoked. The issues presented were thoroughly discussed at the conference sponsored by the advisory committee at the University of Chicago Law School in October 2001. The advisory committee concluded that there may be room to adopt valid rules provisions in the face of these objections, but to do so might test the limits of rulemaking authority, inviting litigation over the rules themselves.

In light of these constraints on rulemaking, and because of the sensitive issues of jurisdiction and federalism implicated by overlapping class actions, Congress is the appropriate body to deal with the question. There is a secure basis in the Article III authorization of diversity jurisdiction to consider various approaches to consolidating overlapping class actions by bringing them into federal court. One approach, exemplified in several of the bills that have been before Congress, would establish minimal diversity jurisdiction in federal court for class actions of a certain size or scope. This approach may embody some elements of discretion; several recent bills bring discretion into the very definition of jurisdiction in an attempt to maintain state-court authority over actions that involve primarily the interests of a single state. Another approach would be to rely on case-specific determinations whether a particular litigation pattern is better brought into federal-court control. This approach could be implemented by authorizing the

Judicial Panel on Multidistrict Litigation to determine whether a particular set of litigations should be removed to federal court. The potential advantage of this approach would be that it could prove more flexible over time, enabling the federal court system to respond to actual problems as they arise and to stay on the sidelines when the problems are effectively resolved in the state courts. Yet another approach would be to authorize individual federal courts to coordinate federal litigation with overlapping state-court actions, by enjoining state-court actions, if necessary, when the state-court actions threaten to disrupt litigation filed under one of the present subject-matter jurisdiction statutes. While this approach may have the apparent advantage of leaving federal jurisdiction where it is, it also has the obvious disadvantage of potential conflict and tension between the court systems.

Careful study will suggest still other approaches. Many of the possible approaches are likely to provide the occasion for adapting present class-action procedures or developing new ones. The rules committees, acting through the Enabling Act process, can make important contributions. The nature of these contributions will depend on the nature of the underlying legislation.

Any proposal to add to federal subject-matter jurisdiction must be considered with great care. The Judicial Conference has opposed one form of minimal diversity legislation. But the problems that persist with respect to overlapping and competing class actions are precisely the problems of multistate coordination that can claim high priority in allocating work to the federal courts. It is very difficult for any single state court to fairly resolve these problems, and nearly as difficult for state courts to act together in shifting ad hoc arrangements for cooperation. The apparent need is for a single, authoritative tribunal that can definitively resolve those problems that have eluded resolution and that affect litigation that is nationwide or multi-state in scope.

Having delved deeply into this topic, the advisory committee made the following findings and recommendations to the Standing Committee on the Rules of Practice and Procedure and the Committee on Federal-State Jurisdiction concerning the problems posed by overlapping class actions:

1. At the direction of the Judicial Conference, since 1991 the Advisory Committee on Civil Rules has undertaken a searching review of class action practice under Rule 23 (JCUS-MAR 91, p. 33). This review has involved several conferences, close consultation with judges, members of the bar and bar organizations, publication for comment of several proposals, consideration of extensive testimony and comments on the published proposals, review of empirical studies, and creation of the Working Group on Mass Torts and adoption of its report;

2. On the basis of this extensive inquiry, the Advisory Committee finds that overlapping and duplicative class actions in federal and state court create serious problems that: (a) threaten the resolution and settlement of such actions on terms that are fair to class members, (b) defeat appropriate judicial supervision, (c) waste judicial resources, (d) lead to forum shopping, (e) burden litigants with the expense and hardship of multiple litigation of the same issues, and (f) place conscientious class counsel at a potential disadvantage;

3. The Advisory Committee has given careful consideration to several rule amendments that might address the problems of multi-state class actions but concludes that these proposals test the limits of the Committee's authority under the Rules Enabling Act;

4. Large nationwide and multi-state class actions, involving class members from multiple states who have been injured in multiple states, are the kind of national litigation consistent with the purposes of diversity jurisdiction and appropriate to jurisdiction in federal court. Federal jurisdiction protects the interests of all states outside the forum state, including the many states that draw back from the choice-of-law problems that inhere in nationwide and multi-state classes;

5. With respect to multi-state class actions, the Advisory Committee agrees with the recommendation of the Federal Courts Study Committee that Congress eliminate the complete diversity requirement in complex, multi-state cases to make consolidation possible;

6. Minimal diversity legislation could be crafted to bring cases of nationwide scope or effect into federal court without unduly burdening the federal courts or invading state control of in-state class actions;

7. Minimal diversity legislation could resolve or avoid some of the problems posed by conflicting and duplicative class actions;

8. The federal and state judicial systems, class members, other parties to the litigation, and conscientious class counsel will benefit from the efficient supervision of these multi-forum, multi-state class actions in one federal forum;

9. For these reasons the Advisory Committee on the Federal Rules of Civil Procedure respectfully recommends to the Standing Committee on the Rules of Practice and Procedure and to the Committee on Federal-State Jurisdiction that they support the concept of minimal-diversity jurisdiction for large, multi-state class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed.

The Committee adopted the findings and recommendations of the advisory committee and forwarded them to the Committee on Federal-State Jurisdiction for its consideration. The Committee plans to continue discussions with the Committee on Federal-State Jurisdiction in an effort to reach a consensus on how best to handle competing and overlapping class actions.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Committee was advised that Director Mecham, as the Judicial Conference Secretary, responded to the request of the House Judiciary Committee chair and three other Representatives for the Judicial Conference's position on pending legislation concerning proposed amendment of Criminal Rule 46(e) (Bail Bond Fairness Act of 2001, H.R. 2929, 107th Congress). The legislation would eliminate the current power of a judge to forfeit a bail bond for failure to satisfy a condition of release, other than "if the defendant fails to appear physically before the court." The Advisory Committee on Criminal Rules carefully considered this issue in 1998, after Judge W. Eugene Davis (chair) had testified before a House Judiciary Subcommittee, and the advisory committee reaffirmed its opposition to the legislation at its most recent meeting in April 2002.

In reaching its decision to oppose the legislation, the advisory committee had surveyed magistrate judges and learned that Rule 46 was working well. Bail bonds in a large majority of districts are forfeited only if the defendant fails to appear at a scheduled proceeding. In some districts, however, courts incorporate conditions of release as part of the bail bond and may

forfeit bonds for violations of those release conditions. In these districts, the magistrate judges strongly believe that holding a relative's or friend's assets at risk significantly increases the probability that the defendant will comply with all the release conditions. Absent this guarantee, these magistrate judges would be more reluctant to release a particular defendant. And in these cases, a magistrate judge might well decide to retain a defendant in custody rather than expose the court to the risk that the defendant will violate a significant release condition, e.g., refrain from drug use. In fact, some defendants themselves propose that their bail bond be subject to forfeiture if they fail to abide by the release conditions as a means of persuading a judge to release them. The advisory committee concluded that Rule 46(e) provides judges with the valuable flexibility to impose added safeguards ensuring a defendant's compliance with conditions of release and opposed legislation restricting it.

The Committee concurred in the conclusions of the advisory committee.

Recommendation: That the Judicial Conference oppose legislation that would amend Criminal Rule 46 to eliminate the authority of a judge to forfeit a bail bond for breach of a condition of release, other than for failing to appear physically before the court.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules proposed amendments to Rule 41 and the rules governing § 2254 and § 2255 proceedings with a recommendation that they be published for comment.

The proposed amendments to Rule 41 (Search and Seizure) provide procedural guidance to a judge issuing a "tracking-device" warrant, which is authorized under 18 U.S.C. § 3117 and case law. The proposed amendments regulate the installation of the device, the contents, execution, and return of a tracking-device warrant, and the notice to the person who has been tracked. The proposed amendments also conform to the USA PATRIOT Act (Pub. Law No.

107-56) by including a provision authorizing a judge to delay any notice required in conjunction with issuing any search warrant.

The proposed amendments to Rules Governing Section 2254 Cases and Section 2255 Cases conform to the Antiterrorism and Death Penalty Act of 1996, and the language of the rules is rewritten to clarify and simplify it as part of a comprehensive restylization project. Among other things, the amendments require the clerk of court to accept all petitions filed under these rules in light of the serious consequences for failing to timely file a habeas corpus petition within the strict one-year statute of limitations time frame imposed under the Antiterrorism Act. The rules are also revised to reflect the statutory requirement that a petitioner first seek approval from the pertinent court of appeals to file a second or successive petition. (The form following the rules is also revised to highlight the Act's one-year statute of limitations and to alert a petitioner of the consequences of failing to include all available grounds of relief in the initial petition.)

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

Informational Item

On the recommendation of the Committee, the Executive Committee on behalf of the Judicial Conference agreed that appropriate leaders of the congressional Judiciary Committees should be advised of inadvertent omissions in amendments proposed to Rule 16 that are due to take effect in December 2002.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted a proposed amendment to Rule 608(b) with a recommendation that it be approved and transmitted to the Judicial Conference.

The amendment was circulated to the bench and bar for comment in August 2001. The scheduled January 2002 public hearing was canceled because no one requested to testify.

The proposed amendment to Rule 608(b) (Specific instances of conduct) clarifies the prohibition on using extrinsic evidence, as was originally intended by the rule, to apply only in cases in which the proponent's sole reason for proffering the evidence is to attack or support the witness's "character for truthfulness," rather than to permit a potentially broader literal reading of the reference to the witness's "credibility" under the existing rule. Notwithstanding the original intent of the drafters of Rule 608(b) and the decision in *United States v. Abel*, 469 U.S. 45 (1984), holding that the Rule 608(b) extrinsic evidence prohibition does not apply when it is offered for a purpose other than proving the witness's character for veracity, a number of cases have construed "credibility" more broadly and prohibited extrinsic evidence proffered to prove non-character forms of impeachment. By expressly limiting the application of the rule to proof of a witness's character for truthfulness as originally intended, the amendment leaves open the admissibility of extrinsic evidence offered for other grounds of impeachment (e.g., prior inconsistent statement, bias, and mental capacity), also as originally intended. The admissibility of extrinsic evidence offered to impeach a witness on grounds other than character continues to be governed by Rules 402 and 403.

The Committee concurred with the advisory committee's recommendations. An excerpt from the advisory committee report describes the proposed amendments and is set out in Appendix C.

> **Recommendation**: That the Judicial Conference approve the proposed amendments to Evidence Rule 608(b) and transmit these changes 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.

Rules Approved for Publication and Comment

In August 2001 proposed amendments were published for comment to Rule 804(b)(3) (Hearsay Exceptions; Declarant Unavailable), which would require "corroborating circumstances" indicating the trustworthiness of an unavailable witness's statement either exculpating or incriminating an accused. The present rule requires "corroborating circumstances" supporting the trustworthiness of a statement *exculpating* an accused, but it does not explicitly require this support for a statement *incriminating* an accused. Consistent with the majority view expressed in the case law, the advisory committee had proposed that the same standard apply to both incriminating and exculpating statements. But the advisory committee decided to withdraw and reconsider the proposal in light of the public comment.

The advisory committee revised the original proposal to account for the Supreme Court's holding in *Lilly v. Virginia*, 527 U.S. 116 (1999), which requires that a statement *incriminating* an accused bear "particularized guarantees of trustworthiness" to satisfy the Confrontation Clause. It noted that the *Lilly* standard may be different from the one requiring "corroborating circumstances" and concluded that explicit reference to "particularized guarantees of trustworthiness" was proper for statements incriminating an accused. Similar to the original proposal, the proposed amendments also extend the "corroborating circumstances" requirement to declarations against penal interest offered in civil cases.

The Committee approved the advisory committee's recommendation to circulate the proposed rule amendment to the bench and bar for comment.

ATTORNEY CONDUCT RULES

The Committee continued to monitor developments concerning legislation affecting attorney conduct rules. No legislative movement has occurred. Representatives of the Department of Justice continue to express concern about the current lack of uniformity in rules

governing attorney conduct. But no formal talks with representatives of the American Bar Association or the Conference of State Chief Justices have taken place, primarily because the Justice Department's attention has been concentrated on other pressing matters, including meeting the threat of international terrorism.

LONG-RANGE PLANNING

The Committee was provided with long-range planning materials and determined that no change to its long-range plan was necessary.

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,

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