PROPOSED RULE AMENDMENTS OF SIGNIFICANT INTEREST

The following summary outlines considerations underlying the recommendations of the advisory committees and the Standing Rules Committee on topics that raised significant interest. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Appellate and Civil Procedure

I. Appellate Rule 4 and Civil Rules 54 and 58

A. Brief Description

The proposed amendments would address a conflict in circuit law regarding the time to appeal a judgment or order that has been entered in the civil docket but not set forth on a separate document as required by Civil Rule 58. Every circuit, save the First, holds that, under such circumstances, the time to appeal never begins to run. Under the amendments, the time to appeal a judgment or order would begin to run on the occurrence of the earlier of two events: (1) when the judgment or order is entered in the civil docket and actually set forth on a separate document; or (2) if not set forth on a separate document, when 150 days have run from the entry of the judgment or order in the civil docket.

B. Arguments in Favor

- The amendments place a 180-day "cap" (150 days from the date of entry of the judgment in the civil docket but not on a separate document and 30 days to file an appeal from the judgment–an additional 30 days for the government) on the time to file an appeal from a judgment that otherwise could be appealed years later because of the failure to enter judgment on a separate document.

- The amendments eliminate a conflict in circuit law on the consequences of failing to enter a judgment on a separate document.

C. Objections

The originally proposed 90-day "cap" (a 60-day grace period plus 30 days to file an appeal) published for public comment drew some concern as being too short a time, creating a potential trap for the unwary.

D. Rules Committees Consideration

The rules committees believed that the existence of judgments and orders that could be resurrected years after they were issued simply because they were not set forth on a separate document posed a significant problem that required attention. Both the Advisory Committees on Appellate and Civil Procedure agreed with public comment that a 90-day "cap" was too short, and recommended an expanded period — 150 days before the time to appeal a judgment begins to run and then 30 days (60 days if the government is a party) to file an appeal from that judgment.

A party who receives no notice whatsoever of a judgment has only 180 days to move to reopen the time to appeal from that judgment. *See* Appellate Rule 4(a)(6)(A). The committees believed that a similar 180-day "cap" should apply when a party receives notice of a judgment, but the judgment is not set forth on a separate piece of paper. The committees concluded that the proposed amendments would not undermine the "separate document" rule, which is intended to notify parties that the time to appeal has begun to run. The parties should be aware of the duty to inquire when there has been no activity in the case for 150 days.

Federal Rules of Bankruptcy Procedure

I. Bankruptcy Rule 2014

A. Brief Description

Section 327 of the Bankruptcy Code conditions appointment of a professional to serve in a bankruptcy case on a court's finding that the professional "does not have an interest materially adverse to the interest of the estate or any class of creditors or equity security holders, *by reason of any direct or indirect relationship to, connection with, or interest in the debtor* or an investment banker ... or for any other reason." (emphasis added). Present Rule 2014 implements § 327 by imposing an absolute requirement, which is broader than the one required under the Code, on an applicant to disclose all of the

person's connections, not only with the "debtor" as required by the section, but also with "creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of United States trustee."

The proposed amendment to Rule 2014 requires a professional to disclose, among other things, "(3) any interest in, relationship to, or connection the person has with the debtor; (4) any interest, connection, or relationship the person has that may cause the court or a party in interest reasonably to question whether the person is disinterested under § 101."

B. Arguments in Favor

- The existing rule is undefined and very broad on its face. It requires more disclosure of a professional's connections with creditors and non-debtor parties in interest than is required by the Bankruptcy Code provision that it implements. The proposed amendments leave intact the demanding disclosure requirements with respect to "connections" with debtors (addressing questions about the neutrality of the professional's disinterestedness that are most likely relevant and which are the focus of § 327), while establishing a more appropriate objective standard with respect to "connections" to creditors and other participants in the case.

- Full compliance with the disclosure requirements, which extends to any connections with attorneys and accountants of creditors, is virtually impossible to meet, resulting in attorneys honoring the rule in the breach. Chapter 11 cases often involve thousands of creditors and other parties in interest, so that full compliance would overwhelm the courts and creditors with irrelevant information.

- The existing rule's undefined standard can result in selective enforcement producing arbitrary results. Courts have refrained from sanctioning a professional for a minor infraction, but that is no guarantee against future sanctions.

C. Objections

- Professionals might have less incentive to investigate and disclose potential connections with creditors and their attorneys and accountants.

- Increased chance that a court will not have adequate information to make an informed decision on the application of a professional.

D. Rules Committees Consideration

The rules committees concluded that the rule should be amended to establish a more realistic and fairer disclosure standard, while still ensuring that the information necessary to make a "disinterestedness" determination continued to be disclosed to the court. Professionals sometimes submit voluminous disclosure documents that contain a mass of irrelevant information in an attempt to gain some level of comfort that their appointment will not result in a later imposed sanction for a failure to be disinterested as required by the Bankruptcy Code. These lengthy submissions are filed at the beginning of Chapter 11 cases when creditors, the United States trustee, and the court have limited time to evaluate the materials and an immediate decision is needed for the case to proceed. The combination of the limited opportunity for review and the extensive nature of the disclosures make it nearly impossible for the court and the creditors to evaluate the request for employment in a manner that fully considers the propriety of the appointment under the Code.

The rules committees concluded that the disclosure requirements articulated under the present rule are too exacting, not required by the Bankruptcy Code, and often counterproductive because they resulted in disclosing too much irrelevant information. The committees believed that the proposed amendment creates a more rational and reasonable disclosure standard that more closely follows the intent of § 327 of the Code, which it is intended to implement. The proposed amendment leaves intact a judge's discretion to require disclosure of more information in an individual case.

The initially published version of the amendment directed the professional to disclose all connections "relevant" to a determination of disinterestedness, which was thought to be broader than "material information" specified under the Bankruptcy Code. The advisory committee revised the proposed amendment after receiving comment to address concerns that the published version of the rule provided too much discretion to the professional in determining the scope of the disclosure. The proposed revision requires a professional to disclose any connection with a debtor and information regarding others that could lead the court or other party in interest reasonably to question the disinterestedness of the professional.

Federal Rules of Criminal Procedure

I. Comprehensive Restyling of Criminal Rules

The proposed style revision of the Criminal Rules is intended to improve the rules' clarity, consistency, and readability. The advisory rules committees identified and eliminated ambiguities and inconsistencies that inevitably had crept into the rules since their enactment. The style changes are intended to be nonsubstantive, unless otherwise specified to resolve ambiguities. Although limited, virtually all comments from the bench, bar, and academia on the stylized rules were favorable.

The style revision has taken up most of the advisory committee's work for the past three years. The revision of the criminal rules completes the second leg of a long-term plan to re-examine all the procedural rules. The Federal Rules of Appellate Procedure were comprehensively restyled in 1998. The experience with that revision was positive and has reinforced the rules committees' commitment to make all the procedural rules clear, consistent, and readable.

In addition to publishing the restyled criminal rules in major legal publications and circulating them to the large bench-and bar mailing list, the proposed amendments were distributed to several hundred law professors who teach criminal procedure. Copies of the proposals were also sent to all major bar groups, including liaisons from each of the state bar associations. Major organizations involved in the administration of criminal justice were alerted early to the project, provided input throughout the project, and commented on the published proposals. The rules committees' deliberate and laborious process was designed to ferret out any inadvertent substantive change. Changes reflecting the resolution of ambiguous language have been explained in the Committee Notes.

II. Video Teleconferencing of Initial Appearance and Arraignment Proceedings

A. Brief Description

The proposed amendments to Rules 5, 10, and 43 would explicitly provide a judge with discretion to conduct initial appearance or arraignment proceedings by video teleconferencing (in lieu of the defendant's physical presence) upon the defendant's consent.

B. Arguments in Favor

- Initial appearances and arraignments conducted by video teleconferencing can only take place with the defendant's consent, which the committees believe avoids most, if not all, the problems opponents raise.

- Video teleconferencing reduces security risks in the courtroom where adequate law enforcement officers are sometimes unavailable to police large groups of prisoners. It also eliminates security risks to officers and to defendants during transit to the courthouse.

- Judges in heavy criminal-caseload districts continue to request that the rules be amended to permit video teleconferencing as a significant way to make their proceedings safer and more efficient.

- The ability to conduct an initial appearance by video teleconference may eliminate delays of up to 48 hours encountered in some large geographic districts before a judge can travel to the defendant's location or the defendant can be transported to the judge's courtroom. Under these circumstances, video teleconferencing can expedite a defendant's release.

- The long distances and inconveniences experienced in traveling from holding facilities to the courthouse can be eliminated by using video teleconferencing.

- Video teleconferencing of preliminary judicial proceedings already is being conducted in many state and some federal court jurisdictions with positive results.

C. Objections

- There might be some cost shifting from the U.S. Marshals' appropriation to the judiciary's Defender Services' appropriation if defense counsel travels to the defendant's holding facility to accompany the defendant to the video teleconferencing.

- A defendant may not fully appreciate the importance of the proceeding if conducted by video, particularly if the setting bears little resemblance to a courtroom.

- The voluntariness of the defendant's consent to the procedure may be questioned if made outside the physical presence of the judge in the holding facility.

- An early and confidential meeting between a public defender and defendant at the initial appearance serves a useful purpose. It may provide a first-time opportunity for counsel to interview the defendant, which might be forfeited if defense counsel opts to appear at the courtroom instead of the holding facility at the initial appearance conducted by video teleconferencing.

D. <u>Rules Committees Consideration</u>

Courts continue to request that the rules be amended to explicitly authorize video teleconferencing of initial appearances and arraignments. The judges in some of these courts routinely face 50 to 100 defendants for summary proceedings in their courtrooms with inadequate security. In other courts, the long distances between the holding facility and the courthouse impose significant delays, security risks, and inconvenience in transporting defendants. The proposed amendments recognize that courts operate under widely differing circumstances and are designed to give courts flexibility to conduct these summary pretrial proceedings by video teleconference where that procedure is needed—so long as the defendant consents.

Most judges probably will not elect to conduct initial appearances and arraignments by video teleconference because the holding facilities, counsel, and prosecutor are all located near the courthouse. But in those courts where distances or a crushing workload are factors, the rules committees concluded that the proposed amendments should be adopted because they promote security, efficiency, and convenience for the defendant and counsel.

The committees believe that the unqualified right of a defendant to insist that the initial appearance or arraignment be held in open court substantially satisfies the concerns raised against the proposed amendments. The committees also believe that vesting discretion in the judge to conduct these proceedings by video teleconference provides a safeguard against potential abuses, which opponents have raised.

Finally, it is likely that the overall cost to the government will be reduced by using video teleconferencing rather than incurring significant costs in transporting defendants to the courthouse, but there may be some cost shifting

from the Marshals' appropriations to the judiciary's appropriations. The extent of the cost shift cannot be precisely estimated because it is unknown how often the video-teleconferencing option will be exercised by defendants. We do know, however, that there is no need for the procedure in many places, while in other places counsel is not now appointed or present at the initial appearance and no travel costs would be incurred if video teleconferencing were used. Any actual cost shift that would result, moreover, may be partially offset by savings derived from other uses of video-conferencing equipment by defense counsel, e.g., providing secure connections for confidential client interviews in lieu of actual meetings obviating travel expenses. On balance, the rules committees believe that any additional costs charged to the judiciary's appropriation would be offset by improvements in security, efficiency, and convenience for the defendant and counsel.