Agenda F-18
Rules
September 2001

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 7-8, 2001. The Department of Justice was represented by Roger A. Pauley, Director, Department of Justice, Office of Legislation, Criminal Division.

Representing the advisory rules committees were: Judge Will L. Garwood, 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 Richard L. Marcus, special consultant, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, 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, Administrative Office's Rules Committee Support Office; Nancy Miller of 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. Chief Justice Charles Talley Wells was unable to attend the meeting.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 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 2000. A scheduled hearing was canceled because no witness requested to testify. The proposed changes, other than amendments to Rule 4(a)(7) and Rule 26.1, are generally "housekeeping."

Rule 1(b) (Rules Do Not Affect Jurisdiction), which provides that the rules "do not extend or limit the jurisdiction of the courts of appeals," would be abrogated as obsolete. Recent legislation (Pub. L. 102-572, 102nd Congress) explicitly authorizes the Supreme Court to prescribe rules that may limit or extend jurisdiction.

Rule 4(a)(7) (Entry Defined) would be amended to address conflicting decisions of the courts of appeals regarding the time to appeal a judgment. If a district court's order or judgment has been entered in the civil docket, but not on a separate document as required by Civil Rule 58, neither the time to bring a post-judgment motion nor the time to appeal ever begins to run. Consequently, judgments improperly entered years ago may still be open to appeal.

The proposed amendments to Rule 4(a)(7), in combination with proposed amendments to Civil Rule 58, cure this problem. First, orders disposing of certain post-judgment motions will no longer have to be entered on a separate document under the proposed amendments to Civil Rules 54 and 58. Second, if a separate document is required under the civil rules, judgment will

be deemed to be entered upon the occurrence of the earlier of the following two events: (1) when the judgment or order is entered in the civil docket and is actually set forth on a separate document; or (2) if not set forth on a separate document, when 150 days have run from entry of the judgment or order in the civil docket. The 90-day "cap" (a 60-day grace period plus 30 days to file an appeal) proposed in the original amendment published for comment was thought too short and might result in a trap for the unwary. The expanded period—150 days before the time to appeal begins to run and then 30 days to file the appeal for a total of 180 days—is believed more suitable because it coincides with the time to move to reopen the time to appeal from a judgment. The amendments to Rule 4(a)(7) would also allow an appellant—for whose benefit the separate document requirement exists—to waive the requirement and bring an appeal without waiting for a judgment or order to be set forth on a separate document. Moreover, the parties should be aware of the duty to inquire when there has been no activity for 150 days.

Under other proposed amendments to **Rule 4 (Appeal as of Right — When Taken)**, a court may extend the time to file an appeal on a showing of excusable neglect or good cause, whether or not the motion for additional time is filed before or during the 30 days provided after the original deadline to file an appeal expires. The amended rule makes clear that the provisions governing the time to appeal a decision in a civil case, and not a criminal case, apply to a writ of error *coram nobis*. The amended rule also provides that motions to correct a sentence under what is currently Criminal Rule 35(c)—and what will become Criminal Rule 35(a) if the restyling of the criminal rules is approved—does not toll the time to appeal a notice of appeal from a judgment of conviction.

The proposed amendments to **Rule 5 (Form of Papers; Number of Copies)** correct a cross-rule reference and limit petitions for permission to appeal to 20 pages.

The proposed amendments to **Rule 21(d) (Writs of Mandamus and Prohibition, and Other Extraordinary Writs)** similarly correct a cross-rule reference and limit petitions for extraordinary relief to 30 pages. The advisory committee agreed with submitted public comments recommending that the page limit on a petition for an extraordinary writ should be increased from 20 pages to 30 pages because it closely resembles a principal brief on the merits.

Rule 24 (Proceeding in Forma Pauperis) would be amended to account for enactment of the Prison Litigation Reform Act of 1995, which requires all prisoners upon filing to pay the full amount of the filing fee or a partial amount with the remainder payable in installments, and which does not permit prisoners who have proceeded in forma pauperis in the district court "automatically" to proceed in forma pauperis on appeal.

The proposed amendments to Rules 25, 26, 36, and 45 set out procedures for providing service and notice by electronic means. They are similar to amendments to the Federal Rules of Civil Procedure that will take effect in December 2001, and they reflect an ongoing effort by the rules committees to maintain uniformity among the different sets of rules when essentially the same procedure is involved.

Rule 25(c)-(d) (Filing and Service) would be amended to permit electronic service of papers on parties who consent to such service in writing and to provide that electronic service is generally complete upon "transmittal." **Rule 26(c) (Computing and Extending Time)** would be amended, consistent with the existing three-day "mail rule," to provide a party with an additional three calendar days to respond to a paper served by electronic means. The three-day provision was included to encourage parties to use electronic service. Providing the additional time also recognizes that although electronic transmission is usually instantaneous, it can be delayed because of technical problems. Under proposed amendments to **Rule 36(b) (Entry of**

Judgment; Notice) and **Rule 45(c) (Clerk's Duties)**, a clerk of court would be permitted to serve a judgment or a notice of entry of an order or judgment electronically on a party who has consented to such service by electronic means.

At the request of the Committee on Codes of Conduct, the advisory rules committees considered changes to the Appellate, Bankruptcy, Civil, and Criminal Rules requiring a nongovernmental corporate party to disclose financial interests as presently required under Appellate Rule 26.1, so that a judge can ascertain whether recusal is necessary. For the present time, the rules committees believed that a rule amendment must be sufficiently flexible to accommodate the preferences of the respective courts on an issue so personal and sensitive to judges. Accordingly, the proposed amendments—like Appellate Rule 26.1—continue to permit courts to require additional disclosure information in an individual case or by local rule.

The proposed amendment of **Rule 26.1 (Disclosure Statement)** is similar to proposed new Civil Rule 7.1 and Criminal Rule 12.4. A nongovernmental corporate party would continue to be required to disclose any parent corporation and any publicly held corporation owning at least 10 percent of its stock. If no such corporation exists, the party will now be required affirmatively to report that fact in its disclosure statement. In addition, a party will be required to supplement the disclosure statement if circumstances change.

The proposed amendments to **Rule 26(a) (Computing and Extending Time)** would eliminate the disparity in counting days for deadline purposes between the appellate rules and the civil and criminal rules. It would exclude intermediate Saturdays, Sundays, and legal holidays when computing deadlines under 11 days but count them when computing deadlines of 11 days or more, similar to the computation methods in the civil and criminal rules. The existing appellate rule accounts for "intermediate" days only for deadlines of fewer than 7 days.

The parenthetical in **Rule 4(a)(4) (Appeal as of Right—When Taken)**, which cross references the time computation method set forth in the civil rules, is deleted as unnecessary in light of the proposed change to Rule 26. Proposed amendments to **Rule 27(a) (Motions)** would change the time to respond to a motion from 10 to 8 days and the time to reply to a response to a motion from 7 to 5 days to account for the additional time provided by including intermediate weekends and holidays in accordance with the computation changes proposed in Rule 26. The time deadline contained in **Rule 41 (Mandate: Contents; Issuance and Effective Date; Stay)** to issue a mandate would be clarified to maintain the existing 7 calendar-day deadline.

The proposed amendments to **Rule 27(d) (Motions)** and **Rule 32 (Form of Briefs, Appendices, and Other Papers)** would specify the color of covers of certain papers filed with the court.

The proposed amendments to **Rule 28(j) (Citation of Supplemental Authorities)** would limit the body of a letter containing supplemental authorities to 350 words and remove the prohibition on "argument." The word limit was increased from 250 words originally proposed by the advisory committee to accommodate public comment expressing concern that the limit was too restrictive.

Rule 31 (Serving and Filing Briefs) would be amended to clarify that copies of briefs must be served on all parties, including unrepresented parties.

The other proposed amendments to **Rule 32 (Form of Briefs, Appendices, and Other Papers)** provide that new Form 6, in which a party certifies that a brief complies with Rule 32's type-volume limitation, must be regarded as sufficient to meet the existing certification requirement of Rule 32. They also provide that every brief, motion, or other paper filed with the court must be signed by the attorney or unrepresented party who files it.

The proposed amendments to **Rule 44 (Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party)** require a party to give written notice to the clerk of court if it challenges the constitutionality of a state statute in a case in which the state is not a party. The amendments also require the clerk to notify the state's attorney general of the challenge.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Appellate Procedure and new Form 6 are in Appendix A together with an excerpt from the advisory committee report.

> **Recommendation**: That the Judicial Conference approve the proposed amendments to Appellate Rules 1, 4, 5, 21, 24, 25, 26, 26.1, 27, 28, 31, 32, 36, 41, 44, and 45 and new Form 6 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, new Rule 1004.1, and amendments to Official Forms 1 and 15 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 2000. A public hearing was held in Washington, D.C. on January 26, 2001.

The proposed amendment to **Rule 1004 (Involuntary Petition Against a Partnership)** eliminates the provision implying that all general partners must consent to the filing of a voluntary petition by the partnership. The filing requirements are a matter of substantive law and outside the scope of the rules.

Proposed new **Rule 1004.1 (Petition for an Infant or Incompetent Person)** establishes procedures for an infant or an incompetent person to commence a case. It is based on the procedures contained in Civil Rule 17(c).

Rule 2004 (Examination) would be amended to compel a witness to attend an examination of an entity under procedures governing a subpoena in Civil Rule 45, whether the examination is conducted within or outside the district in which the case is pending. The proposed amendments also make clear that an attorney authorized to practice either in the court in which the case is pending or in the court for the district in which the examination will be held may issue and sign the subpoena on behalf of the court for the district in which the examination will be held.

Rule 2014 "Disinterestedness" Finding

The proposed amendments to **Rule 2014 (Employment of a Professional Person)** revise the disclosure requirements that apply to a professional seeking appointment to provide services in a bankruptcy case, typically a lawyer designated by the debtor in a Chapter 11 business reorganization case. The present rule implements § 327 of the Bankruptcy Code, which conditions appointment of a professional on a court's finding that the professional is a "disinterested person," defined under § 101(14) of the Bankruptcy Code to be "a person that 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). Carrying out this statutory directive is especially difficult because, as a practical necessity, the "disinterestedness" evaluation must be conducted as soon as possible after the bankruptcy case is filed in order to accommodate the professional, who must immediately begin rendering

substantial services. As long as the court delays making its Rule 2014 "disinterestedness" finding, the professional is rendering those services with no assurance of eventual compensation.

The current language of Rule 2014 imposes an absolute requirement on an applicant to disclose "all of the person's connections with the debtor, 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 disclosure requirements are substantially and unnecessarily broader than the ones required under the Code.

The proposed amendments to Rule 2014 require 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." The amendments ensure that the information necessary to make a "disinterestedness" determination under § 327 continues to be disclosed to the court. The amendments leave intact the demanding disclosure requirements regarding connections with debtors (addressing questions about the neutrality of the professional's disinterestedness that are most likely to be relevant and which are the focus of § 327), while establishing a more appropriate objective disclosure standard that will provide more useful information regarding connections to other participants in the case.

Present Rule 2014 is Ineffective

Present Rule 2014 is intended to assist a court in making its "disinterestedness" finding. But it often hinders an effective evaluation of the professional because the disclosure requirements are undefined and very broad on their face. If every "connection" were disclosed, as required under a literal reading of the rule, the volume of the disclosures would overwhelm the court and interested parties, thereby rendering the disclosure ineffective. To comply with the

present rule some professionals submit voluminous disclosure documents containing 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.

Strict adherence to Rule 2014, moreover, imposes a virtually impossible task on a conscientious attorney or other professional, who must arguably search for and disclose every connection—no matter how trivial—to a debtor, creditors, any other party in interest, and their respective attorneys and accountants. The requirement is no mean task as Chapter 11 cases often involve thousands of creditors and other parties in interest. For example, the disclosure requirement could reach such attenuated connections as serving—in unrelated litigation concluded many years prior to the commencement of the bankruptcy case in which the professional is seeking employment—as co-counsel with an attorney who is an associate in a firm that represents a creditor in the bankruptcy case. As another example, a term life insurance policy issued to a member of the professional's staff, e.g., a paralegal, by a company that is a creditor in the bankruptcy case may have to be reported under the rule's disclosure requirements. In practice, full compliance with the rule is honored in the breach, and professionals intentionally or inadvertently fail to disclose every *de minimis* connection, e.g., small outstanding credit charge

payable to a credit-card creditor company or inconsequential connection between a member, associate, or even employee of the professional's firm and a creditor.

The rule's undefined standard can result in selective enforcement producing arbitrary results. Although courts usually examine all the circumstances in a particular case, apply a reasonableness or common-sense test, and refrain from imposing sanctions for minor or technical infractions, that is no guarantee against sanctioning a professional for minor disclosure omissions.

Under the present disclosure requirements, a professional is responsible to know the identity of the creditors' attorneys and accountants. But it is unrealistic for a professional to contact creditors prior to the commencement of the case to ascertain the identity of their attorneys and accountants without disclosing an impending bankruptcy filing. Such a disclosure would often be fatal to the client's prospect for a successful bankruptcy reorganization. Yet, the current rule demands disclosure of "connections" with those persons or firms.

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. The committees believed that the proposed amendments create a more rational and fairer disclosure standard that more closely follows the intent of § 327 of the Code, which they are designed to implement. Of course, a judge continues to retain discretion to require disclosure of more information, if appropriate, in an individual case.

Proposed Amendments More Closely Follow Intent of § 327 of the Code

The advisory committee was sensitive to the concern that any apparent weakening of the duty to disclose information might encourage professionals to withhold relevant material information. On the other hand, the committee believed that more artful language could be

drafted that is fully consistent with the Bankruptcy Code's "disinterestedness" requirement yet provides a fair and workable disclosure standard for professionals.

The advisory committee's proposed amendments, as published for comment in August 2000, had required disclosure of "relevant" information. This formulation was thought to be broader than "material information" specified by the Bankruptcy Code, yet as a subjective criterion it provided some limited discretion—not permitted under the current rule—to a professional to omit *de minimis* connections. Although the bar commented favorably on the proposal, some judges expressed concern that the requirement was subjective and might lead to inappropriate appointments based on inadequate disclosures. Accordingly, the committee tightened the proposed amendments to require: (1) absolute disclosure of any interest in, relationship to, or connection the professional has with the debtor; and (2) disclosure under a more objective standard of "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."

Rule 2015 (Duty to Keep Records, Make Reports and Give Notice of Case) would be amended to clarify that the trustee or debtor in possession in a Chapter 11 case must report disbursements during the time that quarterly fees are required to be paid under 28 U.S.C. § 1930(a)(6).

The proposed amendment of **Rule 4004 (Grant or Denial of Discharge)** postpones the entry of discharge in a Chapter 7 case on the filing of a motion to dismiss under § 707 of the Bankruptcy Code.

Rule 9014 (Contested Matters) would be amended to apply the provisions of Rule 7009, governing pleading on special matters, and Rule 7017, governing real parties in interest, including infants and incompetent persons, to contested matters; permit service of papers—other

than the initial motion—by electronic means; clarify that an evidentiary hearing must be held if a disputed, unresolved material issue of fact exists; and establish procedures notifying attorneys at an early date of a hearing at which witnesses are to appear.

Rule 9027 (Removal) would be amended to clarify the time limits for filing a notice of removal of a claim or cause of action filed after the commencement of a bankruptcy case, whether the bankruptcy case is pending, suspended, dismissed, or closed.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, and new Rule 1004.1 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Official Form 1 (Voluntary Petition) would be revised to require the debtor to disclose ownership or possession of property posing a threat of harm to the public health or safety.

The proposed revision of **Official Form 15 (Order Confirming Plan)** conforms to the amendment of Bankruptcy Rule 3020, which takes effect on December 1, 2001. If a plan contains an injunction against conduct not otherwise enjoined under the Bankruptcy Code, the revised form provides space for the judge issuing the order confirming the plan to describe acts enjoined and identify entities subject to the injunction. The proposed revision is technical and conforming and was not published for comment.

The advisory committee recommends that the proposed revisions to the Forms take effect on December 1, 2001, to coincide with the amendments to Rule 3020 and to provide sufficient time to publishers and software vendors to format and reproduce the forms for public distribution. The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed revisions to Official Bankruptcy Forms 1 and 15, and that the revisions take effect on December 1, 2001.

The proposed amendments to the Federal Rules of Bankruptcy Procedure and the revisions to Forms 1 and 15 are in Appendix B together with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 1007, 2003, 2009, and 2016, and a new Rule 7007.1, and revisions to Official Forms 1, 5, and 17 together with a recommendation that they be published for comment.

Rule 1007 (Lists, Schedules, and Statements; Time Limits) would be amended to assist judges in making recusal decisions by requiring corporate debtors to disclose any parent corporation and any publicly held corporation owning 10 percent or more of its equity. **Rule 2003 (Meeting of Creditors or Equity Security Holders)** and **Rule 2009 (Trustees for Estates When Joint Administration Ordered)** would be amended to conform the rules with recent legislation that makes multilateral clearing organizations eligible for bankruptcy relief. Proposed amendments to **Rule 2016 (Compensation for Services Rendered and Reimbursement of Expenses)** require a bankruptcy-petition preparer to file a statement disclosing any fee received from a debtor in accordance with § 110(h) of the Bankruptcy Code. New **Rule 7007.1 (Corporate Ownership Statement)** is derived from Appellate Rule 26.1 and requires a corporation that is a party to an adversary proceeding to disclose any parent corporation and any publicly held corporation owning 10 percent or more of its equity interests to assist a judge in making a recusal decision.

Official Form 1 (Voluntary Petition) would be revised to add a box for designating a clearing-bank case filed under subchapter V of Chapter 7. **Official Form 5 (Involuntary Petition)** and **Form 17 (Notice of Appeal)** would be amended to give notice that a child-support creditor or its representative is not required, after submitting the appropriate form specified under the Bankruptcy Code, to pay the fee for filing an involuntary petition or notice of appeal.

The Committee approved the advisory committee's recommendation to circulate the proposed rule amendments and revisions to Official Forms to the bench and bar for comment.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 54, 58, 81, and new Rule 7.1, and proposed amendments to Admiralty Rule C with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments to the Civil Rules were published for comment by the bench and bar in August 2000, and the proposed amendments to Admiralty Rule C were published in January 2001. The scheduled public hearings were canceled because no request to testify was submitted.

Proposed new **Rule 7.1 (Disclosure Statement)** would require a nongovernmental corporate party to disclose any parent corporation and any publicly held corporation that owns 10 percent of its stock, or state that no such corporation exists. The proposed new rule is similar to proposed changes to the Appellate, Bankruptcy, and Criminal Rules.

The proposed amendments to **Rule 54 (Judgments; Costs)** and **Rule 58 (Entry of Judgment)** are intended to address problems caused when a judgment or order is not entered on a separate document, and as a result the time for appeal never begins to run under the Appellate Rules. Under the proposed amendments to Rules 54 and 58, orders disposing of certain post-

judgment motions no longer have to be entered on a separate document. In addition, the amended rules, in conjunction with proposed changes to Appellate Rule 4(a)(7), provide that when a separate document is required, judgment is considered entered upon the occurrence of the earlier of either of two events: when the judgment is entered in the civil docket and set forth on a separate document, or when 150 days have run from entry of the judgment in the civil docket.

Rule 81(a)(2) (Applicability in General) would be amended to delete the specific time deadline for a return of a habeas corpus writ, which is inconsistent with the time limit set out in the Rules Governing Section 2254 Cases or the Rules Governing Section 2255 Proceedings.

Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims (In Rem Actions: Special Provisions) would be amended to conform to the Civil Asset Forfeiture Reform Act of 2000 (Pub. L. 106-185, 106th Congress). The legislation was enacted one week after the Supreme Court had prescribed and transmitted to Congress amendments to Rule C that took effect in December 2000. The legislation contains a deadline of 30 days in which a person may assert an interest or right against the property subject to forfeiture, which is different from the rule's 20-day deadline. The proposed amendment to Rule C increases the relevant time deadline from 20 days to 30 days consistent with the new legislation. It also makes other changes as well to conform to the new legislation.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims are in Appendix C together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Civil Rules 54, 58, and 81, and a new Rule 7.1, and Rule C of Supplemental Rules for Certain Admiralty and Maritime Claims and transmit these changes to the Supreme Court for its consideration with the

recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rules 23, 51, and 53 together with a recommendation that they be published for comment.

The proposed amendments to **Rule 23 (Class Actions)** are based on an extensive study of class actions begun by the advisory committee in 1991. The first stage of the committee's study focused on certification standards and ended with an amendment authorizing permissive interlocutory appeal of a class-action certification order that will foster the development of pertinent appellate case law. The current stage of the committee's study is aimed at matters of process and judicial oversight and addresses concerns expressed by the Supreme Court in recent class-action decisions.

The proposed amendments focus on the timing of the certification decision and notice, judicial oversight of settlements, attorney appointment, and attorney compensation in class actions. They also provide a court with discretion to require in appropriate cases that class members be offered an opportunity to opt out of a Rule 23(b)(3) class upon learning the terms of a proposed class-action settlement. The proposal is intended to provide assurances to the certifying court that if a proposed settlement is unfair the class members can protect themselves by opting out.

Rule 51 (Instructions to Jury; Objections; Plain Error) would be amended to reflect existing practices and to require the court to inform the parties of the instructions before final arguments. The proposed amendments explicitly authorize a court to require submission of proposed jury instructions before trial begins. Moreover, if a court has made a definitive ruling on the record declining to grant a timely requested instruction, a party may assign error for

declining the requested instruction without first renewing the request by objection. The "plain error" doctrine recognized in most but not all circuits would be confirmed.

Rule 53 (Masters) would be comprehensively amended to reflect contemporary practice. Courts have increasingly appointed special masters for pretrial and post-judgment purposes. The existing rule provides little guidance on appointment standards or procedures. The proposed amendments would establish a framework to regularize the practice, but they are not designed to encourage or discourage use of special masters. Comment is particularly requested on whether a de novo or clearly erroneous standard of review is appropriate regarding a master's fact findings.

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

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules completed a comprehensive "style" revision of Criminal Rules 1-60 using uniform drafting guidelines. It also proposed substantive amendments to several rules that have been under consideration outside the "style" project. The two sets of amendments to the Criminal Rules were published in separate pamphlets for comment by the bench and bar in August 2000. Three public hearings were scheduled on the proposed amendments, but only one was held in Washington, D.C. on April 25, 2001, because no witnesses requested to testify at the two other hearings.

Proposed Comprehensive "Style" Revision of Criminal Rules

The "style" revision of the Criminal Rules is part of an effort to clarify and simplify the language of the procedural rules. The comprehensive revision is similar in nature to the revision of the Federal Rules of Appellate Procedure, which took effect in December 1998. The original

draft of the comprehensive revision was prepared by a leading legal-writing scholar. The draft was then vetted by the Committee's Style Subcommittee with the assistance of two law professors. The revised draft was submitted to the advisory committee, which divided itself into two subcommittees. Both the advisory committee and its subcommittees held a total of 16 meetings during a 28-month period intensively reviewing all the rules. The draft went through countless flyspecking sessions and many iterations before it was approved for publication for public comment.

In addition to publishing the proposals 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. These included the Department of Justice, Federal Magistrate Judges Association, Federal Public Defenders Association, and National Association of Criminal Defense Lawyers. Virtually all comments received from the bench, bar, and law professors were favorable to the restyled rules. The only negative comments were received from the National Association of Criminal Defense Lawyers, who were concerned that the changes might generate satellite litigation arising from inadvertent substantive changes. It bears notice, however, that they failed to identify any inadvertent substantive change. The committees' deliberate and laborious process was designed to ferret out any inadvertent substantive changes. No substantive changes beyond those identified by the advisory committee and specifically described in the Committee Notes to the rules have been identified so far.

Overarching Revisions

In its "style" project, the advisory committee focused on several major elements. First, it attempted to eliminate the existing confusion regarding key terms and phrases that appear throughout the rules by simplifying and standardizing them. For example, existing Rule 54 (Application and Exception) draws a distinction between a "Federal magistrate judge," which is limited to a federal magistrate judge, and a "Magistrate judge," which includes state judicial officials. The proposed amendments eliminate these misleading titles and include a state judicial official in the definition of "judge." Second, the committee deleted provisions that no longer are applicable or necessary, usually because case law has evolved since the rule was first promulgated. Third, it reorganized several rules to make them easier to read and apply. Over the years, these rules have evolved inconsistently, occasionally resulting in convoluted provisions. For example, existing Rule 40 (Commitment to Another District) contains multiple layers of procedures that have bedeviled even experienced lawyers. The rule has been reorganized.

Specific Revisions Affecting Present Practices

The "style" revision resolved existing ambiguities in the rules that may affect present practices in some districts, which are identified in the Committee Notes accompanying the specific rule. None of the specific rule changes drew criticism during public comment. The more significant changes are highlighted below.

Rule 4 (Arrest Warrant or Summons on a Complaint) was amended to conform to the recently enacted Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 106th Cong.), which authorizes arrest warrants to be executed outside the United States on military personnel and Department of Defense civilian personnel. The comprehensive "style" revision of the rules was published for comment before the statute was enacted. The proposed amendment to Rule 4

conforms to the later-enacted statutory provisions and is submitted in accordance with established Judicial Conference procedures without first being published for comment.

Rule 5 (Initial Appearance) was amended to conform to the Military Extraterritorial Jurisdiction Act's provisions authorizing a magistrate judge to conduct an initial appearance proceeding of certain persons overseas by telephone communication. The change conforms to the statute and also was not included in the proposed amendments published for comment. In addition, many of the removal provisions presently contained in Rule 40 have been transferred to proposed Rule 5 and are revised to provide a court with flexibility to hold an initial appearance proceeding of an accused who is arrested in a district other than the district where the offense was allegedly committed. Under the proposed amendment, the initial appearance proceeding may occur in the district where the prosecution is pending if that district is adjacent to the district of arrest and the appearance will occur on the day of the arrest.

The title of **Rule 5.1 (Preliminary Hearing)** would be changed from preliminary "examination" to preliminary "hearing," which predominates present usage and more accurately describes the proceeding.

Under the proposed amendments to **Rule 6 (The Grand Jury)**, a court may require disclosure of a grand-jury matter if the disclosure may reveal a violation of military-criminal law.

Consistent with case law, **Rule 7 (The Indictment and the Information)** would be amended to exempt a charge of criminal contempt from the general requirement that prosecutions for a felony must be initiated by indictment.

The proposed amendment to **Rule 9 (Arrest Warrant or Summons on an Indictment or Information)** provides a court with discretion not to issue an arrest warrant if a defendant fails to respond to a summons and if the government declines to request issuance of a warrant.

Rule 12 (Pleadings and Pretrial Motions) would be amended to promote early setting of pretrial-motion deadlines by vesting the authority to set the deadlines exclusively in the judge—instead of the court by local rule.

Rule 16 (Discovery and Inspection) would be amended to require a defendant to disclose reports of examinations and tests that the defendant intends "to use"—instead of items that the defendant intends "to introduce"—at trial. The proposed change is consistent with the standard used elsewhere in the rule regarding the disclosure of other types of information.

Rule 17 (Subpoena) would be amended to conform with the recent amendment of 28 U.S.C. § 636(e), which authorizes a magistrate judge to hold in contempt a witness who disobeys a subpoena issued by that magistrate judge. The proposed amendment was not included in the amendments published for comment because the Federal Courts Improvement Act took effect after publication. The amendment conforms with the new statute and need not be published for comment in accordance with established Judicial Conference procedures.

Rule 24 (Trial Jurors) contains ambiguous language that may be construed to authorize a defendant, who is represented by counsel, to conduct voir dire of a prospective witness. The proposed amendment eliminates this ambiguity by explicitly authorizing a defendant to conduct voir dire only if the defendant is acting pro se.

The provision in **Rule 26 (Taking Testimony)**, which limits taking testimony to only "oral" testimony, would be deleted to accommodate a witness who is not able to give oral testimony, e.g., a witness needing a sign-language interpreter.

Rule 31 (Jury Verdict) would be amended to clarify that a jury may return partial verdicts, either as to multiple defendants or multiple counts, or both.

Rule 32 (Sentencing and Judgment) would be amended to include victims of child pornography under 18 U.S.C. §§ 2251-2257 under the rule's definition of "crimes of violence or sexual abuse." A new provision would also be added to require that a court provide notice to the parties of possible departure from sentencing guidelines on a ground not identified in the presentence report. Finally, the advisory committee withdrew a proposed provision, which had been published for comment, that would have required a judge to make findings on any unresolved objection to a material matter in a presentence report, whether or not it would affect the sentencing decision. The existing requirements are retained, although the Committee Note encourages judges to be sensitive to unresolved controverted matters in the presentence report that may have no effect on the sentence but that may affect the defendant's place of commitment or medical, psychological, or drug treatment.

Rule 32.1 (Revoking or Modifying Probation or Supervised Release) would be amended to provide a procedural framework governing prosecution of a defendant charged with violating probation or supervised release. The proposed amendments would require that the defendant be afforded an initial appearance proceeding, but the proceeding could be combined with a preliminary revocation hearing, a relatively common practice.

The provisions in **Rule 40 (Arrest for Failing to Appear in Another District)** dealing with the initial appearance of a defendant arrested in one district for an offense allegedly committed in another district would be transferred to Rule 5, Rule 5.1, and Rule 32.1. The proposed amendments clarify and simplify the procedures in existing Rule 40, which have caused confusion.

Rule 42 (Criminal Contempt) would be amended to provide explicit procedures governing the appointment of an attorney to prosecute a contempt. It is also amended to

recognize the authority of a magistrate judge to summarily punish a person who commits criminal contempt, consistent with recent statutory changes.

Rule 46 (Release from Custody) would be amended to delete the requirement that the government file bi-weekly reports with the court concerning the status of any defendant in pretrial detention as unnecessary in light of the Speedy Trial Act.

Rule 49 (Serving and Filing Papers) would be amended to permit a court to issue a notice of an order on any post-arraignment motion by electronic means.

Rule 52 (Harmless and Plain Error) would eliminate the ambiguity in the existing rule that refers in the disjunctive to "plain error or defect." As noted in *United States v. Young*, 470 U.S. 1, 15 n.12 (1985), the disjunctive is misleading. The words "or defect" would be deleted under the proposed amendments.

The definitions contained in **Rule 54 (Application and Exception)** would be transferred to Rule 1 under the proposed amendments.

Rule 59 (Effective Date) would be abrogated as no longer necessary.

The Committee concurred with the advisory committee's recommendations. The proposed "style" revision of the Federal Rules of Criminal Procedure is in Appendix D together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 1 through 60 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Proposed "Substantive" Amendments

For several years the advisory committee has been working on separate "substantive" amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43 and new Rule 12.4. The proposed

amendments were published separately from the restylized rules to ensure that each set was separately considered.

Video-Teleconferencing Proposal

The proposed amendments to **Rule 5 (Initial Appearance)**, **Rule 10 (Arraignment)**, and **Rule 43 (Defendant's Presence)** would explicitly provide a judge with the discretion to conduct initial appearance and arraignment proceedings by video teleconferencing (in lieu of the defendant's physical presence) upon the defendant's consent. For nearly a decade, the advisory committee has been urged by judges, particularly judges in large geographic districts, to amend the rules and specifically authorize video teleconferencing of these preliminary proceedings. The proposed amendments generated substantial favorable and negative comment from the bench and bar.

The proposals published for comment in August 2000 included an alternative version that would have authorized a court to conduct these pretrial proceedings by video teleconferencing without the defendant's consent. Although this proposal drew considerable support, especially from the Department of Justice, the advisory committee determined to proceed only with the more limited version that requires the defendant's consent. The advisory committee believed that requiring the defendant's consent and the approval of the judge as preconditions to the use of the video-teleconference procedure substantially satisfied the concerns raised against the proposed amendments.

Some federal district courts take the position that the defendant can now waive the right to be present at a preliminary proceeding, despite the existing provisions of Rule 5, Rule 10, or Rule 43. Other courts question whether the defendant can waive this right. The committee

believed that making it clear in the rules that this procedure is authorized will facilitate its use in appropriate cases by eliminating any reluctance engendered by the potential of a legal challenge.

- Background of Video-Teleconferencing Proposal

The Ninth Circuit Court of Appeals in *Valenzuela-Gonzales v. United States*, 915 F.2d 1276 (9th Cir. 1990), held that Rule 10 does not allow video teleconferencing of an arraignment over the defendant's objections. Since then, the advisory committee received requests to consider amending the rules to permit video teleconferencing of initial appearances and arraignments. Proposed amendments authorizing the procedure in an arraignment with the defendant's consent were published for comment in 1993. At the request of the Committee on Defender Services, however, the advisory committee withdrew the proposal pending completion of a pilot video-teleconferencing project funded by the United States Marshals Service. This pilot project eventually collapsed when the public defender in one of the two courts chosen to participate in the project declined to consent to such a procedure.

Since 1993, several developments have prompted the advisory committee to move forward with the proposed video-teleconferencing amendments. First, the advisory committee continued to receive a steady stream of requests from judges to amend the rules to authorize video teleconferencing. Second, the Judicial Conference has adopted a general policy of promoting video teleconferencing and reiterated its endorsement of this general policy on several occasions. Third, legislation authorizing the procedure has been introduced in Congress. Finally, the quality of video transmission continues to steadily improve. Today's equipment is markedly superior to equipment used only a few years ago.

- Repeated Requests from Judges to Amend the Rules to Authorize Video Teleconferencing

The ever-growing criminal caseload continues to place immense pressures on judges, particularly on judges stationed in "border states" where the volume of criminal cases has exploded. Some of these judges routinely walk into courtrooms packed with 50 to 100 prisoners waiting for summary pretrial proceedings. Many of these prisoners have been on buses during the previous night traveling to the courthouse. The judges working in these conditions have understandable concerns for the security of everyone in the courtrooms. Video teleconferencing of these proceedings not only alleviates some of the security problems, but it also offers a technology that may enhance a judge's flexibility in scheduling proceedings and reduce down-time spent in physically presenting the defendant before the judge.

- Judicial Conference Actions Promoting Use of Video-Teleconferencing Technologies

The *1997 Long Range Plan for Automation in the Federal Judiciary*, approved by the Judicial Conference in 1997 (JCUS-MAR 97, p. 10), encourages courts to "use video telecommunications technologies to facilitate more efficient training, conferencing, administration, and judicial proceedings." The report observes that "when used for courtroom proceedings, video telecommunications technologies may possibly speed the resolution of cases, reduce the cost of litigation, and, for pretrial hearings, reduce security costs and risks by allowing prisoners to participate directly from prison." The June 2000 report of the Committee on Court Administration and Case Management to the Judicial Conference is in accord, noting that "various pretrial, civil and criminal proceedings, sentencings, settlement conferences, witness appearances in trials, arraignments, bankruptcy hearings, and appellate oral arguments are among the types of judicial proceedings in which this technology has proven beneficial where

compelling geographic and logistical conditions exist." Further support for the use of video-conferencing technologies is found in the Director's February 2000 report on Optimal Utilization of Judicial Resources sent to Congress on behalf of the judiciary, which concludes that the procedure is cost effective: "In June 1998, an assessment was completed of the applicability of video evidence presentation, videoconferencing, and other technologies. The study confirmed earlier views that technology in the courtroom can facilitate case management and decision making, reduce trial time and litigation costs, and improve the quality of evidence presentation, fact-finding, jury attentiveness, and understanding, and access to court proceedings."

Today, well over 100 federal court sites are equipped with video-teleconferencing capability. Additional sites continue to be fitted with the new technology. The equipment is used in a wide variety of proceedings, including prisoner proceedings, settlement conferences, and bankruptcy hearings.

- Congressional Interest in Greater Use of Video-Teleconferencing Technologies

On April 26, 2001, Senator Strom Thurmond (R-SC) introduced S. 791 (107th Congress), which would directly amend the Criminal Rules to authorize a court to conduct video teleconferencing of initial appearance and arraignment proceedings without the defendant's consent, and of sentencing proceedings under certain restrictive circumstances. Senator Thurmond remarked that the bill would "promote a safer and more efficient federal court system." He went on to say that video teleconferencing "allows proceedings to operate more efficiently and at lower costs, while maintaining many of the benefits of communicating in person." The bill reflects a recurring congressional theme urging the federal judiciary to fully use technology.

- Quality of Video Transmission

The quality of the transmission from early video-teleconferencing equipment proved unsatisfactory, often with grainy pictures and awkward delays between aural and facial movements. State-of-the-art technology has eliminated much of the deficiencies. Picture quality can be excellent with only the briefest delay detected between sound and movement.

- Justification of Proposal

The advisory committee carefully reviewed the advantages and drawbacks of the video-teleconferencing proposal. It concluded that the proposed amendments should be adopted because they promote security, efficiency, and convenience for the court, defendant, and counsel. The specific reasons include the following:

(1) These summary proceedings by video teleconference can only take place with the defendant's consent, which the committee believes avoids most, if not all, the problems opponents raise.

(2) Conducting pretrial proceedings by video teleconferencing reduces security risks in the courtroom, where adequate law enforcement officers are sometimes unavailable to police large groups of transported defendants. It also eliminates security risks not only to the law enforcement officers but also to the defendants during transit to the courthouse.

(3) Judges continue to request that the rules be amended to provide them with discretion to conduct proceedings by video teleconference in appropriate cases. Particularly in high-volume criminal-case jurisdictions, video teleconferencing would provide a court with added flexibility to control its calendar, provide a more efficient process, and save judges' time.

(4) The ability to conduct an initial appearance by video teleconference may eliminate delays of up to 48 hours and expedite a defendant's release in some large geographic districts (e.g., Eastern District of Washington, Vermont) where the single judge would otherwise have to travel hundreds of miles to conduct the proceeding.

(5) Holding facilities in some jurisdictions are far from the courthouse, imposing significant travel inconvenience on defendants who may be transported early in the morning with a large group of other defendants, compelled to stay at the courthouse until all proceedings are completed, and returned to the holding facility at the end of the day. Video teleconferencing eliminates the need for these travel days with all their attendant problems.

(6) Video teleconferencing is already being conducted with the defendant's consent in many state and some federal court jurisdictions. In many cases, the proceeding is viewed by the defendant as purely administrative with no adjudication and little need for a personal appearance. Judges who have conducted these summary proceedings by video teleconferences recommend them and tell the committee that they have been well received by counsel.

(7) Finally, counsel is not appointed in some jurisdictions until after an initial appearance proceeding. In these cases counsel need not travel to the holding facility where the defendant is appearing for an initial appearance by video teleconference.

The advisory committee is sensitive to the concerns that video teleconferencing may represent an erosion of an important element of the judicial process. A defendant may not fully appreciate the importance of the preliminary proceeding if conducted by video teleconferencing, particularly if the setting is one bearing little resemblance to a courtroom. In addition, although the quality of a court's equipment may be excellent, the equipment at the holding facility may be substandard. The resulting flawed video transmission may reflect poorly on the pretrial proceeding creating a perception that the proceeding is not important. Beyond raising these potential perceptions, the committee was concerned about the voluntariness of a defendant's consent when made outside the judge's presence in the holding facility. On balance, however, the advisory committee concluded that vesting discretion in the judge to either allow or decline to allow video teleconferencing establishes a strong safeguard that obviates many of these concerns. A judge has complete control over the setting, may inquire into the voluntariness of the consent, and may stop video teleconferencing if the transmission quality is unsatisfactory.

The advisory committee also carefully considered continuing concerns expressed by the Committee on Defender Services. The advisory committee recognized that there might be some cost shifting from the Marshals Service's appropriation to the judiciary's Defender Services appropriation if defense counsel travels to the holding facility to stand with the defendant at the

video teleconferencing. The advisory committee concluded that the cost shifting, if any, was justified for several reasons. First, counsel is not appointed prior to nor is present at many initial appearance proceedings, so that the federal public defenders' budget is not affected in these cases. Second, it is unknown how often defense counsel would travel to the holding facility, rather than appear at the courthouse, for the video teleconferencing. Based on the favorable reaction of judges and counsel who have used video teleconferencing for these summary proceedings, the committee believes that as the bar becomes more accustomed to video teleconferencing counsel will become more confident in the integrity of the procedure, and they will increasingly attend the proceedings at the courthouse, if more convenient. In some instances, counsel's office is located closer to the holding facility than the courthouse, and counsel prefers traveling to the holding facility rather than to the courthouse. Finally, although the individual Marshals' and judiciary's budget accounts may be affected differently, the overall cost to the government as a whole will likely be reduced by using video teleconferencing rather than incurring the significant costs in transporting defendants.

In its study of various state-courts' experiences with video teleconferencing of pretrial proceedings, the advisory committee found that state public defenders use the court's video teleconferencing equipment to interview clients in prison. In a state-sponsored comprehensive study of California video conferencing in arraignment proceedings, public defenders praised the system for saving significant travel expenses and time spent on travel to meet and confer with their clients. As video teleconferencing becomes more widespread, any additional cost incurred by public defenders to travel to a prison to attend a pretrial proceeding transmitted by video may be offset by savings later derived from attorney-client interviews conducted using the same equipment.

The Committee on Defender Services' other concerns—lost opportunities that might facilitate early plea negotiations, potential defendant misperceptions about the neutrality of the judicial proceeding, and fears about dehumanizing the process—were issues constantly in the forefront of the advisory committee's deliberations. The Committee Note contains an extended discussion that is intended to alert courts to these concerns and suggests steps to allay them. In the end, the advisory committee believed that ultimately all these concerns must be weighed by the defendant and counsel, and if the benefits of video teleconferencing are found wanting, no consent should be given.

In summary, 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 some districts must operate under the inconvenience of having the prisoner (and sometimes counsel) located some distance from the courthouse and the judge. These amendments recognize that courts operate under widely differing circumstances and are designed to give courts the flexibility to conduct these summary proceedings by video teleconference where that procedure is needed—so long as the defendant consents. The advisory committee believes that the unqualified right of a defendant to insist that the initial appearance or arraignment proceeding be held in open court substantially satisfies the concerns raised against the proposed amendments. The committee also believes that many of the objections will dissolve after the court and counsel have gained experience in using video teleconference for these summary proceedings. The committee heard from judges in 10 judicial districts who have conducted these summary proceedings by video teleconference with the parties' consent. These judges gave positive reports about their experiences with this procedure and urged us to adopt the amendments to remove any doubt about the legality of their actions. The comments of these

judges who had actually worked with this procedure strongly reinforced the advisory committee's conclusion that these amendments should be adopted to give courts the flexibility to use this procedure.

Remaining "Substantive" Amendments

Rule 5.1 (Preliminary Hearing) would be amended to authorize a magistrate judge to continue a preliminary examination over the defendant's objection. The proposed amendment is inconsistent with a parallel statutory provision authorizing only a district judge to continue the hearing if a defendant objects to a magistrate judge doing so. An earlier proposal to seek amendment of the legislation before amending the rule was rejected by the Judicial Conference at its March 1998 meeting. (JCUS-MAR 98, p. 24) The Conference instructed this Committee to move forward with the rule change, which is now under consideration. If approved, it is anticipated that notice will be sent to appropriate congressional offices alerting them of the inconsistency between rule and statute so that conforming legislation may be enacted.

Rule 12.2 (Notice of an Insanity Defense; Mental Examination) would be amended to: (1) clarify that a court may order submission to a mental examination by a defendant who has indicated an intention to raise a defense of mental condition bearing on the issue of guilt; (2) require a defendant to give notice of an intent to present expert evidence of the defendant's mental condition during a capital-sentencing proceeding; (3) authorize a court to order a mental examination of a defendant who has given notice of an intent to present evidence of mental condition during a capital-sentencing proceeding; (4) set out the time provisions for disclosing results and reports of the defendant's expert examination; and (5) exclude any expert evidence from the defendant on mental condition during the punishment phase of a capital case for failing to comply with the rule's notice and examination requirements.

New Rule 12.4 (Disclosure Statement) would require a nongovernmental corporate party to disclose any parent corporation. It closely tracks the financial disclosure provisions proposed in similar amendments to the Appellate and Civil Rules. But the proposed amendment would also require the government to disclose, to the extent it can be obtained through due diligence, the identity of any organizational victim. The disclosure of a victim's financial statement could affect a judge's recusal decision if restitution is ordered.

Rule 26 (Taking Testimony) would be amended to allow the court to use remote "two-way" transmission of live testimony under "exceptional circumstances" when a witness is otherwise unavailable within the meaning of Evidence Rule 804(a)(4)-(5). The proposed amendment tracks an analogous amendment to Civil Rule 43, but is more restricted consistent with Confrontation-Clause considerations.

Rule 30 (Jury Instructions) would be amended to permit a court to request a party to submit its requested jury instructions before trial, consistent with the prevailing practice in many districts. The Committee Note makes clear that the amendment does not preclude the practice of permitting the parties to supplement their requested instructions during the trial.

The proposed amendment of **Rule 35 (Correcting or Reducing a Sentence)** clarifies circumstances when a sentence can be reduced to account for the defendant's substantial assistance in providing information helpful to the government in prosecuting another person when the information was known but not fully appreciated nor acted on within the prescribed time.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Criminal Procedure are in Appendix E together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the separately proposed "substantive" amendments to Criminal Rules 5, 5.1, 10, 12.2, 26, 30, 35, and 43 and new Rule 12.4 and transmit these changes to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Combining "Style" and "Substantive" Amendments in a Single Transmission

The comprehensive "style" revision and the proposed "substantive" amendments of the Criminal Rules were published separately to ensure that each set of proposals received individualized attention. The bifurcated review process has worked well. Many comments were received on the "substantive" amendments, resulting in significant changes to several rules and the withdrawal of several others. Maintaining two separate rules packages has served its purposes, and the Committee now recommends that the Judicial Conference combine the two sets of rules proposals into a single package for the Supreme Court's consideration.

Recommendation: That the Judicial Conference substitute the separately proposed "substantive" Criminal Rules amendments for the corresponding amendments contained in the comprehensive "style" revision of the Criminal Rules, and transmit these changes along with the remaining amendments in the "style" revision as a single set of proposals to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rule 35 with a recommendation that they be published for comment.

Rule 35 (Correcting or Reducing a Sentence) would be amended to define "sentencing," for purposes of the rule, to mean the "entry of judgment." The amendment would clarify an existing ambiguity about when certain time deadlines based on the meaning of "sentencing" begin to start. The advisory committee discovered the ambiguity in the existing

rule only after publication of the "style" revision. The advisory committee concluded that public comment on the proposed amendment would be helpful.

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

Informational Item — Proposed Amendments Governing "Habeas Corpus Rules"

The advisory committee decided to defer taking action on the proposed amendments to rules governing § 2254 and § 2255 proceedings, which had been published for public comment in August 2000 to conform the rules with the Antiterrorism and Effective Death Penalty Act and recent Criminal Rules amendments. The advisory committee plans to "restyle" the rules consistent with the comprehensive "style" revision of the Criminal Rules and consider several new changes to the rules suggested by the public comments.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules proposed amendments to Rule 608(b) and Rule 804(b)(3) with a recommendation that they be published for comment.

The limitation on using extrinsic evidence contained in **Rule 608(b) (Evidence of Character and Conduct of Witness)** is clarified and narrowed under the proposed amendment to apply only to cases in which the proponent's sole purpose is to impeach the witness's character for "veracity." The existing rule prohibits extrinsic evidence to impeach a witness's "credibility," which has been construed broadly by some courts, resulting in conflicting case law. By limiting the application of the rule to proof of a witness's character for truthfulness, the proposed amendment clearly permits the admissibility of extrinsic evidence offered for other grounds of impeachment.

Rule 804(b)(3) (Statement against interest) would be amended to provide uniform treatment of hearsay statements offered as declarations against interest. The rule's requirement to present corroborating circumstances indicating the trustworthiness of any statement exposing the declarant to criminal liability that exculpates the accused would be extended to apply to a statement that incriminates the accused.

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

RULES GOVERNING ATTORNEY CONDUCT

The Committee's Subcommittee on Rules Governing Attorney Conduct continues to monitor discussions among Congress, state court representatives, the American Bar Association, and the Department of Justice on the subject. The Committee has deferred further action, pending the outcome of these discussions.

PRIVACY AND ACCESS TO ELECTRONIC CASE FILES

The Committee reviewed the "Report of the Judicial Conference Committee on Court Administration and Case Management's Subcommittee on Privacy and Public Access to Electronic Case Files." The Committee recognized the need to take swift action and is in general agreement with the report's conclusions.

MODEL LOCAL RULES GOVERNING ELECTRONIC CASE FILING

The Committee also reviewed Model Local Rules Governing Electronic Case Filing proposed by the Committee on Court Administration and Case Management. The Committee worked with the Court Administration Committee in developing the model local rules. The Committee generally endorses them.

MODEL LOCAL RULES PROJECT

The Committee received a brief report on the progress of the local rules project, which involves a comprehensive review of all local rules in the federal courts. The project is in its final stages. An extensive report on the results of the project is expected to be given at the Committee's winter meeting.

LONG-RANGE PLANNING

The Committee considered an agenda item on long-range planning, which seeks input on ways to measure the quality of justice. The Committee agrees that measuring the quality of justice is an important issue that deserves the judiciary's attention.

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 F.

Respectfully submitted,

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Chair

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