November 18, 2002

To: The Chief Justice of the United States
Associate Justices of the United States

From: Judge Anthony J. Scirica

Re: Summary of the Proposed Amendments to the Federal Rules

The amendments to the Federal Rules of Practice and Procedure transmitted from the Judicial Conference are intended to have the following consequences.

APPELLATE RULES

The proposed changes to forms 1, 2, 3, and 5 eliminate outdated references to the last century and substitute references to the present century.

BANKRUPTCY RULES

The Judicial Conference is transmitting one new Bankruptcy Rule and amendments to six other Bankruptcy Rules.

a. Financial Disclosure.

Proposed new Rule 7007.1 will provide judges with information to determine whether they have an interest in a parent corporation of a party that should disqualify them from the litigation. It is modeled on similar disclosure provisions in the Appellate, Civil, and Criminal Rules (Appellate Rule 26.1, Civil Rule 7.1, and Criminal Rule 12.4). The new rule requires any corporate party in an adversary proceeding to disclose corporate entities that own 10% or more of the equity interests of the party so that the court can make its judicial disqualification decision. Amendments to Rule 1007(a)(1) would extend similar financial disclosure requirements to a debtor corporation, other than a governmental unit.

b. Social Security Number Privacy.

The proposed amendments to three rules, Bankruptcy Rules 1005, 1007(c) & (f), and 2002, implement the privacy policy adopted by the Judicial Conference in September 2001 by limiting disclosure of a debtor's social security number on papers filed with a court to only the last four digits. Under Rule 1005, the debtor's social security number must be included in the caption of every document filed with the court. Section 107 of the Bankruptcy Code grants access to the public to all papers filed with the court. In courts with electronic filing systems, these documents — with the social security numbers — are readily accessible via the Internet, raising privacy concerns. The proposed amendments address the competing privacy and public access interests by requiring the debtor to provide only a truncated social security number on filed papers. The full social security number would still be required on certain documents not filed with the court.

Specifically, the proposed amendment to Rule 1005 requires the debtor to include in the petition's caption certain numerical identifiers, but only the last four digits of the debtor's social security number.

The proposed amendment to Rule 1007(f) requires the debtor to submit to the court a verified statement of the debtor's full social security number. But the statement is not filed with the court, so the public does not have a right of access.

The proposed amendment to Rule 2002 requires the clerk of court to include a debtor's full social security number on the notice sent to all creditors. But the full social security number would be included only on the notices sent to the creditors, not on the copy of the notice that becomes part of the court record. Law enforcement agencies, including the Department of Justice, Department of Treasury, and the Internal Revenue Service can obtain access to the full social security number from trustees, creditors, or by application to the bankruptcy court.

c. Multilateral Clearing Organizations.

The proposed amendments to Rule 2003 and Rule 2009 recognize that the Federal Reserve Board designates trustees in cases involving an uninsured state bank operating a multilateral clearing organization governed by subchapter V of chapter 7 of the Bankruptcy Code. In other chapter 7 liquidation cases, the creditors elect the trustee.

d. Petition Preparer Fee Disclosure.

The proposed amendments to Rule 2016 consist of a new subsection, which implements amendments to § 110(h)(1) of the Bankruptcy Code governing disclosure of compensation paid to a bankruptcy-petition preparer. Under proposed Rule 2016(c), a bankruptcy-petition preparer, whether or not an attorney, must file a declaration under penalty of perjury that discloses any fee received from or on behalf of the debtor, and its source, within twelve months of the case's filing.

CIVIL RULES

The Judicial Conference is transmitting proposed amendments to Federal Rules of Civil Procedure 23, 51, and 53, as well as minor changes to three forms.

a. Rule 23 — Class Actions.

In 1991, the rules committees were directed by the Judicial Conference to undertake a study of Rule 23 governing class actions. In 1998, Rule 23(f) was adopted permitting the discretionary grant of interlocutory appeals of certification decisions. The new proposals amending Rule 23 focus on class-action procedures rather than on substantive certification standards. In many instances, they codify best practices in the courts. The amendments are intended to provide the district courts with the tools, authority, and discretion to closely supervise class-action litigation. The proposed amendments focus on five areas: judicial oversight of settlements; the timing of the certification decision; notice; attorney appointment; and attorney compensation.

1. Settlement Approval.

The proposed amendments to Rule 23(e) strengthen the rules provisions governing the review and approval of proposed class settlements that often are presented to the court as a fait accompli without the benefit of the adversary process.

A. Second Opt-Out.

New Rule 23(e)(3) is the most significant change to Rule 23. It expressly authorizes a court to refuse to approve a settlement unless it affords a second opportunity to opt out of a (b)(3) class if settlement is proposed after expiration of the original opt-out period. A second opt-out period provides class members with the ability to make a decision whether to be bound by a settlement with knowledge of the settlement terms — an ability already enjoyed by members of the many (b)(3) classes that are presented for certification after a settlement agreement has been reached. The second opt-out opportunity will be most appropriate where there has been a considerable lapse in time or change in circumstances from the time of the first opt-out opportunity and where members of the class may have substantial damages. There is no presumption that a second opt-out opportunity should be afforded. That question is left entirely to the court's discretion.

B. Other Settlement-Approval Provisions.

New Rule 23(e)(1)(A) would limit the necessity of court approval of any settlement, voluntary dismissal, or compromise 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, because in that case, putative class members are not bound by the settlement. Reasonable notice of a proposed settlement must be sent to the class under new Rule 23(e)(1)(B), but only when class members would be bound by the settlement.

New Rule 23(e)(1)(C) explicitly adopts a "fair, reasonable, and adequate" standard for class-action settlement approvals. The district court must make findings to support its conclusion that the settlement meets this standard.

New Rule 23(e)(2) requires the parties to file a statement identifying any agreement made in connection with a proposed settlement. The rule requires the parties to disclose only the fact that an agreement exists, with the possibility that the court may later require the parties to disclose the contents.

New Rule 23(e)(4) recognizes that any class member may object to a proposed settlement, which is consistent with the Court's recent decision in *Devlin v. Scardelletti*, 122 S. Ct. 2005 (2002), and provides that an objection may be withdrawn only with the court's approval.

2. Certification Timing.

Amended Rule 23(c)(1)(A) would direct a court to make a class-action certification determination "at an early practicable time." Current Rule 23(c)(1)(a) (requiring certification decision "[a]s soon as practicable") has led some courts to believe they must act with undue haste. The proposed change is consistent with present good court practices in making the certification decision only after developing the record required for a sound decision. When appropriate, this inquiry may involve a look beyond the pleadings in order to properly apply Rule 23 requirements.

3. Certification and Notice.

Amended Rule 23(c)(1)(B) requires a court to define the class and identify the class claims, issues, and defenses in its certification order. Among other benefits, explicit definition will facilitate appellate review under the recently promulgated Rule 23(f) interlocutory-appeal provisions.

Rule 23(c)(1)(C) is revised to eliminate any possible ambiguity about the cutoff point for amending an order granting or denying certification, allowing amendment up to "final judgment." Also, the reference to "conditional" class certification is deleted.

Amended Rule 23(c)(2)(A) recognizes the court's discretionary authority to direct "appropriate" notice in mandatory (b)(1) and (b)(2) class actions. Amended Rule 23(c)(2)(B) requires that class-action notices in (b)(3) actions be in "plain, easily understood language."

4. Class Attorney Appointment.

Current Rule 23 does not address 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) by articulating the responsibility of class counsel and providing an appointment procedure.

New Rule 23(g)(1)(A) recognizes that class counsel must be appointed by the court in every case in which a class is certified, unless a statute provides otherwise.

New Rule 23(g)(1)(B) imposes explicit obligations on class counsel to "fairly and adequately represent the interests of the class." Appointment as class counsel entails special responsibilities to the class as a whole.

New Rule 23(g)(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 case.

New Rule 23(g)(2) sets out the appointment procedures for class counsel. Under paragraph (2)(A), the court may designate interim counsel to act on behalf of a putative class before the class is certified. Paragraph (2)(B) recognizes different appointment criteria, depending on whether there is a single applicant or multiple applicants. Paragraph (2)(C) specifically authorizes the court to include provisions on attorney fees in the order appointing class counsel.

5. Attorney Compensation.

Current Rule 23 does not address the award of attorney fees to class counsel. Under new Rule 23(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) determining the amount of the fee by percentage or by the lodestar method.

b. Rule 51 — Jury Instructions.

Despite the language of present Rule 51 that requires instructions to be submitted "at the close of the evidence or at such earlier time during trial as the court reasonably directs," the local rules of many courts require a party to submit proposed jury instructions under Rule 51 before trial begins. The amendment to Rule 51 recognizes a court's authority to require the proposed

jury instructions to be submitted before trial. But the amendment expressly allows a party to file a later request on issues that could not reasonably have been anticipated at an earlier time. The court also may permit untimely requests on any issue.

Subdivision (b) governs the court's obligations with respect to its jury instructions. Paragraph (1) of this subdivision requires the court to inform the parties of all instructions, not only its proposed action on requests for instructions by the parties, 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."

Amended Rule 51(d)(1)(B) makes clear that in order to preserve a claim of error for appeal, a party must both request a proposed jury instruction and object to failure to give the request. It provides, however, that a request suffices without a later objection if "the court made a definitive ruling on the record rejecting the request." This language is similar to that used in Evidence Rule 103(a).

New Rule 51(d)(2) adopts a "plain-error" provision parallel to the approach taken in Criminal Rule 52(b).

c. Rule 53 — Special Masters.

Present Rule 53 explicitly addresses only trial masters who hear trial testimony and report recommended findings. But in practice, masters have come to be used increasingly for pretrial and post-trial purposes. The proposed amendment is designed to reflect contemporary practice and to establish a framework to regularize the practice. At the same time, the revision narrows the use of trial masters from that permitted by present Rule 53, and establishes limits on the use of pretrial and post-trial masters.

Proposed new Rule 53(a)(1)(B) carries forward the demanding standard established by the Supreme Court for appointment of trial masters. But the new rule restricts the use of trial masters by permitting use of a master in a jury-tried case only with the consent of the parties and approval of the court. The court's responsibility is further increased by substituting de novo review of factual findings for the present clear-error review; clear-error review is allowed only on stipulation of the parties with the court's consent.

As to pretrial and post-trial masters, new Rule 53(a)(1)(C) permits appointment only to address matters that cannot be addressed effectively and timely by an available district judge or magistrate judge. This standard will protect against untoward delegation of judicial responsibilities.

The procedures for appointing a master are tightened to address questions that have regularly occurred in practice. The order appointing a master must, among other matters, state the circumstances — if any — in which the master may communicate ex parte with the court or a party. The proposed rule also sets out procedures governing a master's compensation.

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

d. Forms.

The proposed changes to forms 19, 31, and 32 eliminate outdated references to the last century and substitute references to the present century.

EVIDENCE RULES

The proposed amendment to Rule 608(b) clarifies that the prohibition on using extrinsic evidence to establish "credibility" applies 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." This change restores the rule to its original intent and codifies the Court's interpretation of the rule. *See United States v. Abel*, 469 U.S. 45 (1984). Despite this precedent, some lower courts have prohibited extrinsic evidence whenever a proponent attacks the witness's credibility in a sense other than the witness's character for truthfulness.

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A more complete explanation and background of these proposed rules amendments and new rules are set out in the excerpts of the Committee's report to the Judicial Conference, including the appendices, which contain Committee Notes to the rules. The Advisory Committee chairs and I would be pleased to answer any questions about the proposed changes.

Anthony J. Scirica
Chair, Committee on Rules of Practice
and Procedure

cc: Honorable Samuel A. Alito, Chair, Advisory Committee on Appellate Rules
Honorable A. Thomas Small, Chair, Advisory Committee on Bankruptcy Rules
Honorable David F. Levi, Chair, Advisory Committee on Civil Rules
Honorable Edward E. Carnes, Chair, Advisory Committee on Criminal Rules
Honorable Jerry E. Smith, Chair, Advisory Committee on Evidence Rules