COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 11-12, 2007
Phoenix, Arizona
**Minutes**

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## ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona on Thursday and Friday, January 11 and 12, 2007. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Chief Justice Ronald M. George
Judge Harris L Hartz
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Professor Daniel J. Meltzer
Judge James A. Teilborg
Judge Thomas W. Thrash, Jr.

Joan E. Meyer, Senior Counsel to the Deputy Attorney General, participated in the meeting on behalf of Deputy Attorney General Patrick J. McNulty, *ex officio* member of the committee. The Department of Justice was also represented at the meeting by Elizabeth U. Shapiro of the Criminal Division.

Also in attendance were Justice Charles Talley Wells, Judge J. Garvan Murtha, and Dean Mary Kay Kane (former members of the committee); Judge Patrick E. Higginbotham (former chair of the Advisory Committee on Civil Rules); Justice Andrew D. Hurwitz (member of the Advisory Committee on Evidence Rules); Patricia Lee Refo, Esquire (former member of the Advisory Committee on Evidence Rules); and Professor Stephen C. Yeazell.

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Jeffrey N. Barr, attorneys in the Office of Judges Programs of the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; Matthew Hall, law clerk to Judge Levi; and Joseph F. Spaniol, Jr., Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

## INTRODUCTORY REMARKS

Judge Levi welcomed Chief Justice George, Judge Teilborg, and Professor Meltzer as new members of the committee. He noted that Chief Justice George had served at every level of the California state courts, been a very successful prosecutor, and served on the Judicial Conference's Federal-State Jurisdiction Committee. He explained that Judge Teilborg had built and led a great Arizona law firm and now sits as a U.S. district judge in Phoenix. He pointed out that Professor Meltzer teaches at the Harvard Law School, is a truly gifted legal scholar, authors the Hart and Wechsler text book, and serves on the council of the American Law Institute.

Judge Levi expressed regret that the terms of three outstanding members of the committee had expired on October 1, 2006 – Justice Wells, Judge Murtha, and Dean Kane. He presented them with plaques for their service signed by the Chief Justice. He praised Justice Wells for his great wisdom and for the unique perspective that he brought to the committee on issues affecting federalism and the state courts. He thanked Judge Murtha for his enormous contributions to the civil rules restyling project over the last several years, for chairing the committee's style subcommittee, and for his work as advisory committee liaison. He honored Dean Kane for her indefatigable work over several years on the civil rules restyling project and for her outstanding scholarship and uncanny problem-solving ability.

Judge Levi announced that he would be leaving the federal bench on July 1, 2007, to accept the position of dean of Duke Law School. He said that he would sorely miss the challenging work of the federal judiciary. But he would miss even more the people with whom he has worked. He said that the federal judiciary is comprised of the most astonishing group of men and women in the country. He added that he was excited about his new job, but would like to continue to be of assistance to the federal judiciary in the future.

Judge Levi reported that the September 2006 meeting of the Judicial Conference had been uneventful in that all the rule amendments recommended by the committee had been approved on the Conference's consent calendar without discussion. The approved rules included the complete package of restyled civil rules and the amendments to the civil, criminal, bankruptcy, and appellate rules to protect privacy and security interests under the E-Government Act of 2002. Judge Levi also reported that the controversial FED. R. APP. P. 32.1, allowing citation of unpublished opinions in all the circuits, had gone into effect on December 1, 2006.

## APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee by voice vote voted without objection to approve the minutes of the last meeting, held on June 22-23, 2006.**

## REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on two legislative matters of interest to the committee. First, he said, Representative F. James Sensenbrenner, Jr., former chairman of the House Judiciary Committee, had asked the Judicial Conference to initiate rulemaking to address certain issues arising from the waiver of evidentiary privileges through disclosure. He reported that the Advisory Committee on Evidence Rules had drafted a proposed new FED. R. EVID. 502 that would explicitly address waivers of attorney-client privilege and work product protection. But, he explained, the Rules Enabling Act specifies that any rule amendment affecting an evidentiary privilege requires the affirmative legislative approval of Congress. Mr. Rabiej added that with the recent change in control of Congress from the Republicans to the Democrats, it will be necessary for representatives of the judiciary to discuss the proposed Rule 502 with the new leadership of the judiciary committees.

Second, Mr. Rabiej reported that on December 6, 2006, the Senate Judiciary Committee had conducted an oversight hearing on implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He said that the judiciary had not sent a witness to testify at the hearing, but had submitted a statement from Judge Zilly, chair of the Advisory Committee on Bankruptcy Rules. The statement reported on the actions of the advisory committee in developing rules and forms to implement the Act, and it included extensive attachments documenting the enormous efforts made by the judiciary to implement the new statute.

Mr. Rabiej added that Senator Grassley had made a remark at the hearing complaining that the advisory committee had not faithfully carried out the intent of the law in drafting the new means test form for consumer bankruptcy cases. He said that Judge Zilly sent a letter to the senator explaining in detail that the advisory committee had faithfully executed the plain language of the statute in drafting the form. The committee will consider his letter at its April 2007 meeting, along with other suggestions submitted during the public comment period.

Mr. Rabiej reported that the proposed rule amendments approved by the Judicial Conference had been hand-carried to the Supreme Court in December 2006. He added that all the proposed rules, as well as public comments and other committee documents, have been posted on the judiciary's web site. He said that the Administrative Office is

working with the committees' reporters to give them direct access to all the documents in the rules office's electronic document management system.

Mr. McCabe added that all the records of the rules committees since 1992 are in the electronic document management system and fully searchable. In addition, all committee reports and minutes since 1992 have been posted on the judiciary's public web site, and all committee agenda books back to 1992 will soon be posted. In addition, he said, a majority of committee reports and minutes before 1992 have been located, converted to electronic form, and posted on the web site. But, he said, many rules records before 1992 are not available in the files of the Administrative Office. The staff has been searching the archives of law schools and the papers of former reporters and members to locate the missing documents. The ultimate goal of the rules office, he said, is to find and post on the web site all the key rules documents from the beginning of the rules system to the present and to make them readily searchable with a good search engine.

## REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending activities of the Federal Judicial Center. He directed the committee's attention to three research projects.

First, he said, judges have a great personal interest in how their courtrooms are being used. He reported that the Center was working with the Court Administration and Case Management Committee of the Judicial Conference on a comprehensive courtroom usage study in response to a specific request from Congress. Among other things, he said, members of Congress have noticed that the number of trials in the district courts has been declining steadily, and they question whether courtrooms are being used fully and effectively.

Second, Mr. Cecil said, the Center is developing educational materials for judges on special case management challenges posed by terrorism cases, based on lessons learned by judges who have already handled terrorism cases.

Third, he reported that the Center is continuing to gather information for the Advisory Committee on Civil Rules regarding summary judgment practices in the district courts. He added that Center researchers are examining summary judgment motions filed in 2006, how they were handled by the district courts, and what their outcomes were.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 6, 2006 (Agenda Item 5).

*Informational Items*

Judge Stewart reported that the advisory committee had met in November 2006 and had decided to approve in principle amendments to two rules.

First, a proposed amendment to FED. R. APP. P. 4(a)(4)(B)(ii) (effect of a motion on a notice of appeal) would eliminate an ambiguity created in the 1998 restyling of the appellate rules. The current rule might be read to require an appellant to amend its notice of appeal in any case in which the district court amends the judgment after the notice of appeal has been filed. Judge Stewart said that the advisory committee believed that the problem could be cured by fine tuning the language of the rule. He said that the committee would take another look at the exact language at its next meeting.

Second, Judge Stewart reported that the advisory committee had received a suggestion to amend FED. R. APP. P. 29 (brief of an amicus curiae). Modeled after Supreme Court Rule 37, the amended appellate rule would require the filer of an amicus brief to disclose whether the brief is authorized or funded by a party in the case. He said that the advisory committee had decided that a uniform national rule was preferable in this area to a variety of local circuit rules. He reiterated that the committee had approved the Rule 29 amendment in principle, subject to further refinements. One member suggested, though, that the Supreme Court rule may not be particularly helpful and is not strictly enforced.

Judge Stewart noted that the advisory committee had been busy with the time-computation project. He pointed out that Professor Struve, the advisory committee's reporter, was also serving as the reporter for the overall time-computation project and had compiled a huge amount of valuable information. He added that a special Deadlines Subcommittee, chaired by Judge Jeffrey S. Sutton (6th Circuit), had reviewed each time limit in the appellate rules, especially the short periods that would be affected by the change in time-computation approach under the proposed new uniform rule.

Judge Stewart said that the advisory committee had also looked into whether it would be useful for the new time-computation rule to include a provision addressing dates certain, as opposed to dates that require computation, and it had concluded that such a provision was not necessary. He added that some members of the committee had misgivings about the very need for the time-computation project, particularly with regard

to its impact on deadlines set forth in statutes. Nevertheless, he said, the committee would proceed with the project at its April 2007 meeting.

Judge Stewart reported that the advisory committee was continuing to consider whether too many briefing requirements are set forth in the local rules of the courts of appeals. He said that the Federal Judicial Center had completed an excellent study identifying and analyzing all the briefing requirements of the circuits, and he had written a letter to the chief judges of the circuits expressing the advisory committee's concern over local requirements and whether all were necessary. He said that the letter to the chief judges referred to the work of the Federal Judicial Center and emphasized the need to make all local procedural requirements readily accessible to practitioners. He added that the chief judges of six of the circuits had responded to his letter, and the advisory committee would consider the responses at its April 2007 meeting. Professor Capra added that, in the course of reporting the results of the district court local rules project, the chief district judges had been very positive in responding to the letters from the Standing Committee identifying local rules that appeared to be inconsistent with the national rules.

One member pointed out that some local rules are of substantial benefit to the circuit courts, and there will be a great deal of opposition to eliminating them. But, he said, some of the beneficial provisions now contained in local rules might well be incorporated into the national rules. Judge Stewart responded, though, that there are a great many variations among the circuits in their local rules, and it would be very difficult to reach agreement on the contents of the national rules. A member observed that circuit courts do not hear many complaints from the bar about their local rules because attorneys who practice regularly before a particular court get used to the local requirements. Courts, he added, rarely hear from attorneys who have a national practice.

Another member noted that he finds it increasingly difficult as a practitioner to know how to prepare briefs because of the proliferation of local rules. Many local requirements, he said, are little more than busy work and create potential traps for the bar. Moreover, the staff of the clerks' offices waste time kicking the papers back to lawyers for noncompliance with the local rules. He encouraged the advisory committee to continue its work in the area. But he concluded that local briefing requirements, while annoying, do not rise to the level of importance in the overall scheme of the advisory committee's work, for example, as the new FED. R. APP. P. 32.1, which has overridden local circuit rules that had barred lawyers from citing unpublished opinions.

Judge Levi pointed out that the rules committees should continue to be concerned about local rules. He noted that some local rules affect substance, and many increase costs and create confusion for the bar. Professor Coquillette added that Congress, too, has expressed concerns regarding local court rules – as opposed to the national rules –

because local rules do not go through the Rules Enabling Act process, which affords Congress an opportunity to review and reject the rules.

Judge Stewart reported that the advisory committee had on its study agenda a proposal from the Virginia State Solicitor General to amend FED. R. APP. P. 4 (notice of appeal – when taken) and FED. R. APP. P. 40 (petition for panel rehearing) to treat state-government litigants the same as federal-government litigants for the purpose of giving them additional time to take an appeal or to seek rehearing. He mentioned that members of the advisory committee had questioned the need for the changes, as well as the scope of the proposed amendments. He said that the committee would study the proposal further.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of November 30, 2006 (Agenda Item 8).

### *Amendments for Publication*

### FED. R. BANK. P. 7052, 7058, and 9021

Judge Zilly reported that the advisory committee was seeking authority to publish amendments to FED. R. BANK. P. 7052 (findings by the court) and FED. R. BANK. P. 9021 (entry of judgment) and a proposed new FED. R. BANK. P. 7058 (entry of judgment). The package of three rules would address the requirement of FED. R. CIV. P. 58(a) that every judgment be set forth on a "separate document" and coordinate the bankruptcy rules with recent revisions to the civil rules.

He explained that when a court fails to enter a judgment on a separate document, revised FED. R. CIV. P. 58 provides a default 150-day appeal period, rather than the normal 30-day appeal period in the civil rules. Bankruptcy matters, he said, usually require prompt finality, and the bankruptcy rules provide for a shorter 10-day appeal period generally. The key questions for the advisory committee, thus, are: (1) whether the bankruptcy rules should continue to contain the separate document requirement; and (2) whether the bankruptcy system can live with the default 150-day appeal period of the civil rules. He explained that the advisory committee had decided to retain the separate document requirement for adversary proceedings because they are similar to civil cases. But the more difficult question is whether to retain the separate document requirement for contested matters.

Judge Zilly noted that the advisory committee had a heated discussion on the matter. Half the members favored enforcing the separate document requirement for all judgments in bankruptcy cases, including judgments in contested matters, because it provides certainty to the litigation process. The other half argued, though, that many bankruptcy courts simply do not comply with the present rule, finding it administratively difficult to enter separate judgments on every matter when bankruptcy judges commonly dispose of large numbers of contested matters on a single calendar. Judge Zilly reported that the committee had decided ultimately, on his tie-breaking vote, that contested matters should no longer be subject to the separate document rule. Thus, in contested matters, the docket entry of the judge's decision will be sufficient to start running the appeal period.

As a matter of drafting, Professor Morris explained that Part VII of the Bankruptcy Rules applies the Federal Rules of Civil Procedure to adversary proceedings. There is, however, no counterpart to FED. R. CIV. P. 58 in Part VII. Instead Civil Rule 58 is made applicable to both adversary proceedings and contested matters through FED. R. BANKR. P. 9021. The advisory committee's proposal would confine the separate document requirement of Rule 58 to adversary proceedings by: (1) creating a new FED. R. BANKR. P. 7058 just for adversary proceedings; and (2) eliminating the reference to Civil Rule 58 in FED. R. BANKR. P. 9021.

Several committee members suggested changes in the language of the proposed amendments, and Judge Zilly agreed that the advisory committee would address the suggestions at its March 2007 meeting.

**Judge Hartz moved to approve the proposed amendments in principle, with the understanding that the advisory committee would consider additional changes in language. The committee by voice vote unanimously approved the motion.**

*Informational Items*

Judge Zilly reported that the advisory committee had published a large package of rules amendments and forms in August 2006 designed to implement the massive Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Most of the rules, he said, were derived from the interim rules used in the bankruptcy courts since October 2005. He noted that the public hearing on the amendments had been cancelled because no witnesses had asked to appear. The committee, he said, would consider all the written public comments at its March 2007 meeting and return to the Standing Committee in June 2007 for final approval of the package.

Judge Zilly reported that the advisory committee had created a subcommittee to apply the proposed new time-computation proposals to the bankruptcy rules. He noted that the subcommittee already had identified more than a hundred time limits in the

bankruptcy rules that would be affected by the proposals. He noted, moreover, that the bankruptcy rules currently differ from the other federal rules because they exclude weekends and holidays in computing time periods of fewer than 8 days, rather than periods of fewer than 11 days.

Judge Zilly explained that the advisory committee would be prepared to present appropriate amendments dealing with time limits for approval at the June 2007 Standing Committee meeting. But, he said, members of the committee had expressed concern over going forward with more changes to the bankruptcy rules so soon after having published a large package of proposed amendments in August 2006. Moreover, many of the time-limit changes arise in rules already being amended for other reasons.

Judge Zilly noted that the advisory committee had also identified a modest number of provisions in the Bankruptcy Code that impose time limits of fewer than 8 days. He said that legislation to amend the Code should be pursued because the new time-computation rules will effectively shorten these short statutory periods even further by including weekends and holidays in the count.

Judge Zilly reported that the advisory committee was considering potential changes in the bankruptcy rules to implement section 319 of the 2005 bankruptcy legislation. Section 319 would enhance the obligations of debtors' attorneys (and pro se debtors) regarding the papers they file with the court and with trustees. It states that it is the sense of Congress that FED. R. CIV. P. 9011 (sanctions) should be modified to require that all documents, including schedules, submitted on behalf of a debtor under all chapters of the Code contain a verification that the debtor's attorney (or a pro se debtor) has "made reasonable inquiry to verify that the information contained in [the] documents" is well grounded in fact and warranted by existing law or a good faith argument to extend, modify, or reverse the law. He noted that the language of the statute is different from that of the current Rule 9011.

Judge Zilly pointed out that a separate section of the new law, now codified at 11 U.S.C. § 707(b)(4)(C) and (D), made similar, but not identical, changes affecting the obligations of attorneys in Chapter 7 cases only. Section 707(b)(4)(C) provides that a debtor's attorney's signature on a Chapter 7 petition, pleading, or written motion constitutes a certification that the attorney has "performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion" to determine that the document is well grounded. Section 707(b)(4)(D) provides that an attorney's signature on a Chapter 7 petition constitutes a "certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect."

Judge Zilly explained that the advisory committee had decided originally not to propose an amendment to FED. R. BANKR. P. 9011 (signing of papers, representations to

the court, and sanctions) to mirror the statute because the statute itself is so specific regarding the obligations of debtors' attorneys. But, he said, the committee had agreed to change the official petition form to include a warning alerting attorneys to the new obligations imposed on them by the 2005 legislation.

Judge Zilly added that letters had been received from Senators Grassley and Sessions urging the advisory committee to amend the bankruptcy rules to reinforce the statutory provision. Judge Zilly pointed out that the advisory committee was continuing to study the issue and might change its original position. He noted that because the statute was designed by Congress to push more debtors from Chapter 7 into Chapter 13, the committee might recommend that the same debtor-attorney verification now applicable in Chapter 7 cases by statute be extended by rule to filings under all chapters of the Code.

Judge Zilly reported that a Senate Judiciary Committee subcommittee had held an oversight hearing in December 2006 to review implementation of the 2005 bankruptcy legislation. He noted that he had been invited to speak, but had been tied up in a criminal trial and could not attend. He did, however, submit a written report documenting the enormous efforts of the judiciary to implement all the requirements of the legislation.

At the hearing, he noted, Senator Grassley had submitted written comments criticizing the advisory committee for including an entry on the new means-testing form that allows a debtor to claim certain expenses that the debtor may not have actually incurred. Judge Zilly pointed out, though, that the committee had scrupulously followed the language of the statute in drafting the form. He added that he had sent a response to Senator Grassley explaining that the plain language of the statute compelled the language adopted by the advisory committee. Moreover, he added, the form in question was part of a package of rules and forms still out for public comment.

Judge Levi pointed out that the advisory committee had faithfully complied with its obligation to implement the statute as written. He congratulated Judge Zilly, Professor Morris, and the entire advisory committee for a monumental achievement in producing a comprehensive package of rules and forms to implement the 2005 legislation.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of December 12, 2006 (Agenda Item 9).

Judge Rosenthal pointed out that most of the items in the advisory committee's report had been brought to the Standing Committee's attention previously, some of them in connection with the project to restyle the civil rules. She noted that the advisory committee had delayed moving on the proposals until it had completed its work on the restyling and electronic discovery projects.

### *Amendments for Final Approval*

### SUPPLEMENTAL RULE C(6)(a)

Judge Rosenthal reported that the proposed changes to Supplemental Rule C(6)(a) (statement of interest) were purely technical and did not have to be published. They would correct a drafting omission occurring during the course of adopting Supplemental Rule G, which took effect on December 1, 2006. The new Rule G abrogated portions of other supplemental rules and gathered in one place the various provisions of the supplemental rules dealing with civil forfeiture actions in rem.

In amending Rule C, though, the committee forgot to capitalize the first word of subparagraph (6)(a)(i). Judge Rosenthal explained that the omission could be cured simply by inserting the capital letter, but the advisory committee had decided to make some additional minor changes to improve the way the rule reads and to make it parallel with other subdivisions of the rule.

**The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.**

### *Amendments for Publication*

### FED. R. CIV. P. 13(f)

Judge Rosenthal reported that the advisory committee was recommending deletion of Rule 13(f) (omitted counterclaim). The committee, she added, had considered eliminating the rule as part of the restyling process, but had decided that the change was substantive in nature.

Rule 13(f) allows a court to permit a party to amend its pleading to add a counterclaim if justice so requires. She explained that it is largely redundant of Rule

15(a) (amended and supplemental pleadings) and is potentially misleading. She noted that the standards in the two rules for permitting amendments to pleadings sound different, but they are administered identically by the courts. Deletion of Rule 13(f), she said, will bring all pleading amendments within Rule 15 and ensure that the same amendment standards apply to all pleading amendments.

**The committee without objection by voice vote approved deletion of Rule 13(f) for publication.**

FED. R. CIV. P. 15 (a)

Judge Rosenthal reported that the advisory committee was proposing a change in Rule 15(a) (amendments to pleadings before trial) that would give a party 21 days after service to make one pleading amendment as a matter of course. The change, she said, would make the process of amending pleadings less cumbersome for the parties and the court. She noted that the committee had also considered making changes to Rule 15(c), dealing with the relation back of amendments to pleadings, but had decided not to do so because the subject matter is enormously complicated and the textual problems in the current Rule 15(c) do not seem to have caused significant difficulties in practice.

Judge Rosenthal pointed out that the proposed revision in Rule 15(a) would set a definite time period within which a party may amend a pleading as a matter of right. Under the current rule, serving a responsive pleading terminates the other party's right to amend as a matter of course. On the other hand, serving a motion attacking the pleading delays the time to file a responsive pleading and thus extends the time within which a party may amend a pleading as a matter of right. The rule causes problems because the party filing a motion attacking the complaint – and the judge – may invest a good deal of work on the motion only to have the pleader amend its pleading as a matter of right. In many cases, she noted, after an opponent points out an error in a pleading, the pleader will simply admit the error and amend the pleading.

Judge Rosenthal said that the advisory committee had decided that there was no reason to continue that distinction. Accordingly, the proposed amendment gives a party the right to amend its pleading within 21 days after service of either a responsive pleading or a motion under Rule 12(b), (e), or (f). She added that the amendment recognizes the current reality that courts readily give pleaders at least one opportunity to amend.

In addition, Judge Rosenthal explained that the advisory committee had extended a party's response time from 20 days to 21 days in light of the general preference of the time-computation project to fix time limits in 7-day intervals. The amended rule also eliminates the current reference to a "trial calendar" because few courts today maintain a

central trial calendar. Finally, she noted, a party may also continue to seek leave to amend under Rule 15(a)(2) or Rule 15(b).

Professor Cooper mentioned that the advisory committee for several years had been looking at recommendations to reconsider notice pleading as one of the basic features of the civil rules. But, he said, it had always decided that the time was not right to make such a change. Allowing the parties great flexibility to amend pleadings reflects the spirit of the current notice-pleading system. Since the courts freely allow parties to amend pleadings, the advisory committee decided that it would make considerable sense to give a pleader 21 days to amend as a matter of course.

Professor Cooper said that the proposed rule would take something away from plaintiffs by cutting off their automatic right to amend after 21 days in all cases. It would also take something away from defendants by eliminating their right to cut off the plaintiffs' automatic right to amend by filing an answer. The advisory committee, he said, had concluded that the current distinction may make some sense, but on balance it is not needed. In most cases when a motion to dismiss is filed, it is filed before an answer is filed. The proposed rule, therefore, would increase the plaintiff's freedom to amend only when a motion to dismiss accompanies or comes after an answer,

Judge Rosenthal reported that, following the advisory committee meeting, a Standing Committee member had submitted thoughtful comments questioning the wisdom of the proposed amendment. She pointed out that his comments, together with a response from the advisory committee's Rule 15(a) Subcommittee, had been included in the agenda book for the information of the Standing Committee.

The member asserted that it is important for defendants to have the ability, by filing an answer, to cut off a plaintiff's right to amend a complaint without leave of court. He said that the proposed rule takes this right away from defendants, and in so doing alters the current balance between plaintiffs and defendants. He acknowledged that in the normal case, a defendant will challenge a defective pleading by filing a motion to dismiss, rather than an answer. But in the infrequent case where the defendant believes that it has a complete defense on the law, it will file an answer first and only then file a motion to dismiss.

By removing this possibility, the proposed rule would do more than restrict the defendant's options in those infrequent cases where the defendant would file an answer first. The proposed rule would have broader negatives consequences in a wide range of other cases.

He explained that some commercial litigation is initiated by badly drafted, badly conceived complaints, often in complete ignorance of the law. The first motion filed by the defendant is often a treatise in the form of a motion to dismiss, requiring the plaintiff

to file a whole new complaint. By this tactic, the plaintiff manages to impose on the defendant the cost of educating the plaintiff about the applicable law. Then the defendant has to incur the further expense of filing a second motion to dismiss the new complaint.

The current Rule 15, however, gives plaintiffs cause to pause before filing their complaint, because if the defendant files an answer instead of a motion to dismiss, the plaintiff needs leave of court to amend the complaint, and the plaintiff cannot be certain that leave will be granted. Plaintiffs have to take into account the possibility that the defendant can cut off their right to amend their defective complaint by filing an answer first, followed by a motion to dismiss. This, he said, makes some plaintiffs more careful in preparing the complaint. It is a benefit that accrues to the system in a wide range of cases, not only to the particular defendants in those few cases where an answer actually is filed first. The impact is hard to quantify, he said, but it is real. The rules should encourage plaintiffs to put formality and forethought into their filings, and the proposed change would undercut that.

Under the proposed rule, he said, there will be no means by which the defendant can cut off the plaintiff's right to amend, and plaintiffs will know that. The proposed rule will have the effect of requiring defendants, even if they have a strong legal defense, to incur the costs of filing two motions to dismiss without any corresponding burdens on the plaintiff.

Another member pointed out that the problem raises the more fundamental issue of reconsidering the whole concept of notice pleading. Judge Levi responded that the issue was on the long-term agenda of the advisory committee. But, he said, the committee was not inclined to address the matter as a global issue. Rather, he said, it is was looking at modifying the practice of notice pleading in specific situations.

Judge Rosenthal added that the advisory committee had looked at notice pleading when it drafted the 2000 amendments to the discovery rules, tying discovery to the pleadings and encouraging more specific pleadings. She added that the committee was also considering whether motions for a more definite statement under FED. R. CIV. P. 12(e) could be made more vigorous. She said that a motion for a more definite statement is rarely granted today because the standard for granting them is so high. The committee might want to make the motion more readily available. That way, she said, the committee would address the impact of notice pleading in specific situations without having to rebuild the whole structure.

One member reported that by local rule in his district, discovery does not begin until the defendant files an answer. As a result, defendants simply do not file answers. Instead, they always file motions to dismiss, which leads to a good deal of unnecessary effort on the part of the judges. They are often faced with starting all over again when the plaintiffs exercise their right to file an amended pleading. Thus, he said, the proposed

amendments to Rule 15 are enormously attractive to him because they will avoid judges having to waste efforts on motions to dismiss. Second, he complimented the advisory committee for the brevity of the committee note. He said that it was a model of what a note should be – identifying the changes in the rule and succinctly explaining the reasons for the changes.

Judge Rosenthal responded that these anecdotes highlight the incentives and tactics of modern civil litigation and the shifting of costs. It is rare, she said, that both a motion and an answer are filed. She said that the advisory committee would like the Standing Committee to authorize publication of the proposal, and the particular problems raised in the discussion could be highlighted in the publication with an invitation for the public to comment on them. She added that the proposed amendments to Rule 15 do not represent major changes, given the fact that circuit law across the country liberally gives, or requires, one amendment as a matter of right.

Some members agreed with the suggestion to publish the proposals for public comment and said that it could produce valuable information. One shared the concern that the change in Rule 15 might cause a burden to defendants, but only in very rare cases. He concluded that it is probably not a significant issue, but it would be helpful to get more information during the public comment period.

**The committee with one objection voted by voice vote to approve the proposed amendments for publication.**

FED. R. CIV. P. 48

Judge Rosenthal reported that the proposed new Rule 48(c) (polling) would provide a procedure for polling jurors in civil cases. It is modeled after FED. R. CRIM. P. 31(d), but also includes a provision referring to the ability of the parties in a civil case to stipulate to less than a unanimous verdict.

**The committee without objection by voice vote approved the proposed amendment for publication.**

FED. R. CIV. P. 62.1

Judge Rosenthal reported that the proposed new Rule 62.1 (indicative rulings) had its origin in a suggestion several years ago to the Advisory Committee on Appellate Rules from the Solicitor General. Since the basic question addressed by the proposed rule involves the authority of a district judge to act when an appeal is pending, the appellate rules committee concluded that the rule would be better included in the Federal Rules of Civil Procedure.

The proposed rule adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) (relief from judgment or order) to vacate a judgment that is pending on appeal. The rule, though, goes beyond Rule 60(b) and would apply to all orders that the district court lacks authority to revise because of a pending appeal. It would give a district judge authority to "indicate" that he or she "might" or "would" grant the motion if the appellate court were to remand for that purpose. Judge Rosenthal added that the procedure is well established by case law, but it is not explicit in the current rules and is often overlooked by lawyers. Moreover, some district judges are unaware of its existence.

Judge Rosenthal pointed out that the advisory committee would publish the proposed rule with alternative language in brackets. The choice for public comment would be between having the district court indicate that it "might" grant relief or indicate that it "would" grant relief. She said that good arguments can be made for either formulation. The advantage of the "might" language, she pointed out, is that it would likely preserve judicial resources because the trial judge would not have to do all the work to resolve the motion in advance of remand.

Judge Rosenthal noted that members of the Standing Committee had raised a couple of questions about the proposed rule at the June 2006 meeting. The first was whether the location of the rule as new Rule 62.1 was appropriate. The advisory committee, she said, had considered the location anew and had concluded that Rule 62.1 made the most sense. She noted that it belonged in Part VII of the rules, dealing with judgments, but because of its broad scope, it did not fit in with the other judgment rules – Rules 54, 58, 59, 60, 61, or 62. Moreover, Rule 63 shifts to another topic.

The second concern expressed was whether the title "indicative ruling" was appropriate. She said that it had been selected because it is a term of art familiar to appellate practitioners and embedded in the case law, although it may not be recognized by lawyers whose practice is not centered on appeals. The advisory committee, she noted, had reached no firm conclusion on an alternative caption. One suggestion, she said, was to expand the caption of the rule to "Indicative Ruling on Motion for Relief Barred by Pending Appeal."

Judge Rosenthal noted that the Advisory Committee on Appellate Rules had suggested that it might want to make a cross-reference to the new rule in the appellate rules. She said that this would be very helpful. Judge Stewart said that his committee had discussed the matter and would add a cross-reference. He added that the committee had not expressed a preference between "might" and "would." He noted that the court of appeals would be more likely to remand a case back to the district court if the trial judge were to indicate that he or she "would" grant the relief than if the judge merely indicated that he or she "might" grant it. But, he said, his committee recognized the additional burden that would be imposed on the district judge in the former case.

One member supported the rule and said that it would provide helpful clarification in a difficult area. But he expressed concern that it might provide district judges with open-ended authority once a matter is pending on appeal and could give lawyers an opportunity to amend the record.

Professor Cooper responded that the key point is that the court of appeals remains in control. He noted that the advisory committee had been very cautious in expanding the authority from its basis in Rule 60(b) to other kinds of relief. The district court, he said, should be allowed to deny a motion that does not have merit and get it over with. Judge Rosenthal emphasized that the rule permits better coordination between the two courts.

One participant pointed out that there are a number of limited remands in his court. He asked whether it might be better for the rule to state that the only options for the court of appeals are either to deny the remand or order a limited remand. This would institutionalize the concept of a limited remand, under which the court of appeals keeps the case, but remands solely for the purpose of deciding one issue. He suggested that the language of Rule 62.1(c) might be amended to track the language of the committee note on this point. Professor Cooper agreed that the advisory committee might want to consider adjusting the language.

Judge Levi pointed out that the Standing Committee did not have to approve the rule for publication at the current meeting. Moreover, since the rule involves two advisory committees and some helpful language suggestions had been made, the advisory committee could work further on the language and come back for authority to publish in June 2007.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of December 18, 2006 (Agenda Item 6).

### *Informational Items*

Judge Bucklew reported that the advisory committee had held its regular autumn meeting in October 2006. It also had held a teleconference meeting in September 2006 specifically to address the proposed amendments to FED. R. CRIM. P. 16 (discovery and inspection).

### FED. R. CRIM. P. 32(h)

Judge Bucklew reported that the Standing Committee in June 2006 had returned a proposed amendment to FED. R. CRIM. P. 32(h) (sentencing – notice of possible departure) to the advisory committee for reconsideration in light of specific comments offered by Standing Committee members. The proposal, she said, was part of a package of amendments designed to conform the criminal rules to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). The current Rule 32(h) requires a court to give reasonable notice to the parties that it is considering imposing a non-guidelines sentence based on factors not identified in the presentence report or raised in pre-hearing submissions. The proposed amendment would also require reasonable notice when the court is considering imposing a non-guideline sentence based on a factor in 18 U.S.C. § 3553(a).

She explained that the Standing Committee had asked for further consideration for a number of reasons. Some members, she said, had pointed to a difference in case law among the circuits, counseling that it would be premature to attempt to codify a rule. Others expressed concerns that the proposed rule might interfere with orderly case management by causing unnecessary continuances and adjournments. Other members suggested that since the sentencing guidelines are now advisory, there should be no expectation of a guideline sentence. Therefore, there is no reason for the court to give notice. Judge Bucklew reported that the advisory committee had taken all these arguments into consideration, and it had specifically considered correspondence from the federal defenders urging the committee to proceed with the proposed amendment. In conclusion, she said, the advisory committee was continuing to review the case law and consider a proposed amendment. Professor Beale added that the Supreme Court had recently granted certiorari in two sentencing cases that might shed some light on the wisdom of proceeding with the amendment.

### FED. R. CRIM. P. 49.1

Judge Bucklew reported that the Standing Committee had approved new Rule 49.1 (privacy protections for filings made with the court), but it had asked the advisory committee to give further consideration to two concerns raised by the Court Administration and Case Management Committee. First, that committee had suggested that the new criminal rule require redaction of the grand jury foreperson's name from indictments filed with the court. Second, it had suggested that personal information be redacted from search and arrest warrants filed with the court.

Judge Bucklew said that the advisory committee had decided not to require redaction of the grand jury foreperson's name because the indictment is the formal charging document that initiates the prosecution, and other rules require that it be signed by the foreperson, be returned in open court, and be given to the defendant. Moreover, she pointed out, a recent survey of U.S. attorneys' offices and the U.S. Marshals Service had demonstrated that disclosure of the names of jurors has not created security difficulties. Professor Beale added that the survey had revealed no more than two instances of juror-related threats or inappropriate contacts in any recent year. Fear of juror intimidation, moreover, is most likely to center on the defendant himself or herself – who is entitled to a copy of the indictment in any event – and not from persons discovering a juror's name through an electronic posting by the court.

Judge Bucklew said that the advisory committee was continuing to study whether personal information should be redacted from warrants. She noted that there was strong sentiment among committee members to retain the information in the public file because the public has a right to be aware of government activities and to know who has been arrested and what property has been searched. She added that warrants are not generally filed until they are executed, and the committee was considering the feasibility of redaction once a warrant has been executed. In any event, there may be no need to require redaction in the rule because relief is always available on a case-by-case basis.

FED. R. CRIM. P. 16

Judge Bucklew reported that the advisory committee had met by teleconference on September 5, 2006, to continue work on a proposed amendment to Rule 16 (discovery and inspection) that would require the government, on request, to turn over exculpatory and impeachment evidence favorable to the defendant. The proposal, she noted, had come from the American College of Trial Lawyers in 2003, had been drafted by an ad hoc subcommittee of the advisory committee, and had been discussed at every recent meeting of the advisory committee. She pointed out that the Department of Justice was strongly opposed to the proposal, but had been very helpful in drafting changes to the U.S. Attorneys' Manual to elaborate on the government's disclosure obligations. It had been suggested, she said, that the manual revisions might serve as an alternative to an amendment to FED. R. CRIM. P. 16.

Judge Bucklew explained that the advisory committee had before it at the teleconference a nearly final revision of the U.S. Attorneys' Manual, as well as a nearly final version of the proposed amendment to Rule 16 and an accompanying committee note. The key question for the committee, therefore, was whether to proceed with the proposed rule or accept the revised text of the manual as a substitute. In the end, she said, the committee voted to go forward with the rule, partly because the revised text of the manual continued to give prosecutors discretion and was not a complete substitute for the proposed rule and also because advice in the manual is entirely internal to the Department of Justice and not judicially enforceable.

Judge Bucklew and Professor Beale said that the revisions to the U.S. Attorneys' Manual were a major achievement, and the Department of Justice deserved a great deal of credit for its efforts. Judge Bucklew added that the advisory committee would likely return to the Standing Committee in June 2007 with a proposed amendment to Rule 16, and the Department of Justice would likely offer its strong objections to the rule.

One member suggested that it was important for the advisory committee to develop sound empirical information to support its proposal. He suggested that the Standing Committee needs to know how serious and widespread the problems of nondisclosure may be in order to justify the rule. Judge Bucklew responded that members of the defense bar can describe individual examples of improper withholding of information, but hard empirical data is very difficult to compile.

Professor Beale added that there is no way to quantify all the cases in which disclosure is not made. The obligations of prosecutors are subjective and depend on the particular facts of a case. Individual acts of nondisclosure are difficult to document because the defense usually has no knowledge of the exculpatory information, which is in the hands solely of the government. The few cases that are litigated are brought after conviction. She explained that the proposed rule goes beyond simply codifying existing *Brady* obligations, and the advisory committee will compare it to the rules of the state courts, the standards of the American Bar Association, and the rules of local federal district courts.

One member pointed out that there are great variations among the rules of the district courts, especially as to the timing of disclosures. He said that one good argument for the proposed rule is the need for national uniformity in the face of the current cacophony in local rules. Another suggested that although the revisions in the U.S. Attorneys' Manual are not judicially enforceable, they are being noticed by the defense bar, as well as by prosecutors, and more issues related to disclosure will be raised.

Judge Levi urged caution. He noted that with an issue as highly contentious as this, the committee's work will be placed under a microscope. The stakes in the matter, he said, are very high, and any proposed rule presented to the Judicial Conference needs

to be fully justified. He pointed out that the proposed rule raises issues that will have to be decided by case law, such as what constitutes impeachment information and how the rule affects the burden of proof on appeal. It is predictable, he said, that some members of the committee, and the Judicial Conference, will see the proposal as a policy shift that needs to be justified clearly. He suggested that the committee might want to monitor experience with the revisions in the U.S. Attorneys' Manual before going forward with the rule.

FED. R. CRIM. P. 37

Judge Bucklew reported that the advisory committee was considering proposals by the Department of Justice for a new FED. R. CRIM. P. 37 (review of the judgment) to restrict the use of ancient writs, and changes in the §§ 2254 and 2255 rules to prescribe deadlines for filing motions for reconsideration. She noted that the committee had appointed a Writs Subcommittee, chaired by Professor Nancy King, that is considering whether it is advisable – or even possible under the Rules Enabling Act – to propose a rule, modeled on FED. R. CIV. P. 60(b), that would abolish all the ancient writs other than coram nobis.

Some participants urged caution and questioned whether there was authority to abolish the writs through the rules process. They also suggested that the writs may have Article III constitutional dimensions. Members also discussed the extent to which the ancient writs, especially coram nobis, are still used in federal and state courts.

FED. R. CRIM. P. 32.2

Judge Bucklew reported that the advisory committee was considering amendments to Rule 32.2 (criminal forfeiture), with the help of a subcommittee chaired by Judge Mark Wolf. She noted that the subcommittee was considering the advice of the Department of Justice, the federal defenders, and the National Association of Criminal Defense Lawyers in this very difficult area.

FED. R. CRIM. P. 41

Judge Bucklew reported that the advisory committee was considering proposed amendments to Rule 41 (search and seizure) to deal with search warrants for information in electronic form. She noted that the members of the committee had attended a full-day tutorial presented by the Department of Justice walking them through the mechanics of how electronic materials may be stored, copied, and searched.

Judge Bucklew noted that the advisory committee was working on implementing the proposed new time-computation rule and considering proposals by the Department of Justice to permit the examination of a witness outside the presence of the court and by the

Federal Magistrate Judges Association for a rule to cover warrants for violation of supervised release or probation. Finally, she noted that the committee would be conducting a public hearing in Washington on January 26, 2007, at which five witnesses had signed up to testify on the proposed amendments to the criminal rules published in August 2006.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of December 1, 2006 (Agenda Item 7).

### *Informational Items*

### FED. R. EVID. 502

Judge Smith reported that the advisory committee had been devoting most of its time to the proposed new Rule 502 (attorney-client privilege and work product; limits on production), published for public comment in August 2006. He pointed out that a substantial number of witnesses had signed up to testify at the committee's two scheduled public hearings – one in Phoenix immediately following the Standing Committee meeting and the other in New York on January 29, 2007.

Judge Smith explained that the advisory committee was proceeding in accordance with the limitation of the Rules Enabling Act that any "rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074(b). He pointed out that proposed Rule 502 had been drafted in response to a request from former Chairman Sensenbrenner of the House Judiciary Committee asking the committee to initiate rulemaking to address issues arising from disclosure of matters subject to attorney-client privilege or work product protection. He said that the new Democratic leadership of the Congress had not yet been consulted on the proposal.

Judge Smith highlighted four preliminary actions taken by the advisory committee at its November 2006 meeting in response to public comments on the rule. First, he said, the committee had voted to retain the words "should have known" in the proposed language of Rule 502(b). It would condition protection against inadvertent waiver on whether the holder of the privilege took reasonably prompt measures "once the holder knew or should have known of the disclosure." He said that a comment had been made that the language might give rise to litigation over exactly when the producing party should have known about a mistaken disclosure. But, he said, it was the sense of the committee that the language had substantial merit and should be retained.

Second, Judge Smith pointed out that proposed Rule 502(b) would provide protection from waiver against third parties when a disclosure is "inadvertent" and made "in connection with federal litigation or federal administrative proceedings." Proposed Rule 502(c) would provide protection when the disclosure is "made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority." He said that a comment had recommended that the language of the two provisions be made identical by extending the protection for mistaken disclosures occurring during proceedings to those occurring during investigations.

Judge Smith said that a majority of the advisory committee was of the view that the difference between the language of the two subdivisions was justified. The committee, thus, decided that the protections of Rule 502(b) should continue be limited to mistaken disclosures made during court and administrative proceedings.

Third, Judge Smith said that the advisory committee had not decided whether to approve the "selective waiver" provision set forth in proposed Rule 502(c). It specifies that disclosure of privileged information to a government regulator does not constitute a waiver in favor of third parties. He explained that the committee had published this provision in brackets in order to emphasize that it was undecided about the matter and was seeking the views of the public as to the merits of including it in proposed Rule 502. He noted that the selective waiver provision had attracted strong opposition from lawyers and bar association representatives.

One participant noted that several public comments had opposed the selective waiver proposal on the grounds that it would erode the attorney-client privilege. A number of comments also referred to an alleged "culture of coercion" under which the Department of Justice considers a corporation's cooperation, including waiver of the attorney-client privilege and work product protection, as a factor in deciding whether to prosecute and on which criminal charges.

Judge Smith noted, too, that concern had been expressed by state judges that a federal selective waiver provision would subsume state waiver rules. He pointed out that Justice Hurwitz, a member of the Advisory Committee on Evidence Rules, had attended the most recent meeting of the Federal-State Jurisdiction Committee of the Judicial Conference and had had an opportunity to discuss with fellow state Supreme Court Justices the proposed rule and pertinent federal-state issues.

Fourth, Judge Smith reported that the advisory committee was in general agreement that arbitration proceedings should be covered by the protection of Rule 502 only if they are court-ordered or court-annexed arbitrations.

Judge Smith pointed out that these issues – and others listed in the agenda book and raised in the public comments and hearings – would be taken up again at the advisory committee's April 2007 meeting.

ADAM WALSH CHILD PROTECTION ACT

Judge Smith reported that the Adam Walsh Child Protection Act of 2006 had directed the advisory committee and the Standing Committee to "study the necessity and desirability of amending the Federal Rules of Evidence to provide that the confidential marital communications privilege and the adverse spousal privilege shall be inapplicable in any Federal proceeding in which a spouse is charged with a crime against 1) a child of either spouse; or 2) a child under the custody or control of either spouse."

The statutory provision, he said, appears to have been motivated by one aberrant circuit court decision allowing a criminal defendant's wife to refuse to testify even though the defendant had been charged with harming a child in the household. He said that the advisory committee had concluded that the case was of questionable authority and was even contrary to the precedent of its own circuit. Therefore, the Federal Rules of Evidence need not be amended to take account of it. Almost all other reported opinions, he said, have held that the protections provided by the marital privileges do not apply in cases where the defendant is charged with harm to a child.

Professor Capra noted that he had reached out to advocates for battered women for their views on whether it is good policy to have an exception to the privileges in a case where there may be harm to a child. He awaits responses from them.

Professor Capra added that the advisory committee would prepare a report for the Standing Committee to send to Congress. The report, he said, would include appropriate draft language of a rule amendment in case Congress disagrees with the conclusion that no rule change is necessary.

RESTYLING THE EVIDENCE RULES

Judge Smith reported that Chief Justice Rehnquist had expressed opposition to restyling the rules of evidence. Nevertheless, in light of the success in restyling the other federal rules and the presence of awkward language in the evidence rules, the advisory committee was taking a second look at the advisability of proceeding with a restyling effort. He noted that a couple of evidence rules had been restyled as samples for the advisory committee's review, and it was the general sense of the members that the committee should continue with the effort at a modest pace, as long as the new chief justice agrees. Professor Capra added that an important argument in favor of restyling is that the evidence rules are strongly geared to the use of paper. Judge Levi asked whether it would be possible at the next Standing Committee meeting for the advisory committee

to bring forward a couple of examples of restyled evidence rules. Judge Smith agreed to do so.

Judge Smith said that the advisory committee was doubtful that there was any need for changes in the evidence rules to take account of the new time-computation rules. He suggested that a reference to the evidence rules might better be included in the other rules. He also reported that the advisory committee was continuing to monitor the case law in the wake of *Crawford v. Washington*, 541 U.S. 36 (2004), dealing with testimonial hearsay. He observed that the courts are addressing the issues in a very professional manner, and it is far too early for the advisory committee to act.

## REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of December 14, 2006 (Agenda Item 11).

Judge Kravitz reported that a great deal of work had been undertaken on the time-computation project by the subcommittee, the advisory committees, and the committee reporters. He pointed to the text of the proposed template rule in the agenda book and said that it would be adopted in essentially identical form for the civil, criminal, appellate, and bankruptcy rules. Its central focus is to simplify counting for the bench and bar by eliminating the current two-tier system of computing time deadlines, under which weekends and holidays are excluded in calculating time periods of fewer than 11 days (8 days in bankruptcy), but included in calculating periods of 11 (or 8) days or more. Under the new template rule, all days will be counted as days. Only the last day of a time period will be excluded if it happens to falls on a weekend or holiday.

Judge Kravitz noted that the template rule provides a method for counting both forward and backward and a method for counting time periods expressed in hours. The rule defines the "last day" for filing as: (1) midnight, in the case of electronic filing; and (2) the time the clerk's office is scheduled to close, in the case of filing by other means.

He also noted that there are some issues that the new rule does not address. For example, the rule applies only when a time period must be computed. It does not apply when a court fixes a specific time to act. It also does not change the "three-day rule," under which a party served by mail or certain other forms of service is given three extra days to respond. Moreover, it does not address explicitly whether litigants can file papers at a judge's home or a clerk's home after hours in light of 28 U.S.C. § 452, which states that courts "shall be deemed always open for the purpose of filing proper papers." He pointed out that Professor Struve had prepared an excellent memorandum on that particular issue in the agenda book.

The proposed rule, he said, also does not attempt to define the "inaccessibility" of a clerk's office for filing, although it does eliminate language that limits "inaccessibility" to weather conditions. He reported that the Standing Committee had asked the subcommittee to consider defining the term, but the subcommittee's memorandum to the Standing Committee contained a lengthy explanation as to why additional time and experience are needed in the electronic filing world before this issue can be addressed properly. He noted that most courts have adopted a local rule specifying what lawyers should do when there is a technical failure of the court's computers. The local rules vary greatly, but most require affidavits by lawyers and permission by the court on a case-by-case basis. They do not give parties an automatic extension for filing.

Finally, Judge Kravitz reported that the subcommittee had decided to continue to include state holidays in the rule, but he noted that it had seriously considered eliminating them because federal courts tend to remain open on state holidays. A member of the Standing Committee repeated his earlier view that state holidays should not be included in the definition of a "legal holiday." Judge Levi suggested that the subcommittee's decision to retain state holidays as an exception in the rule might be highlighted in the publication as a means of soliciting the views of the public on the issue. Other members suggested that the committee note also include a reference to national days of mourning.

Judge Kravitz added that additional suggestions for improvement in the language of the proposed rule had been offered recently by Professor Kimble, the committee's style consultant. He noted that the advisory committees were using the template and revising the specific time limits in their respective rules to make sure that the ultimate net effect of the new rule would be neutral to attorneys. Thus, the advisory committees will likely increase the 10-day time limits in their rules to 14 days because a 10-day deadline in the current rule normally gives a party 14 days to act because of intervening weekends. Judge Kravitz pointed out that the advisory committees were also attempting to express rules deadlines in multiples of 7 days, for all deadlines of fewer than 30 days.

He pointed out that some reservations had been expressed as to the wisdom of proceeding further with the time-computation project. He noted, in particular, that some members of the appellate rules committee had suggested that the current system for counting time is not broken, the proposed changes are not needed, and problems are created with regard to deadlines expressed in statutes. Nevertheless, even though some members believe that the project is unnecessary, the appellate advisory committee was proceeding to make appropriate changes in the appellate rules in light of the proposed template rule.

Judge Kravitz reported that the Federal Rules of Bankruptcy Procedure pose a number of additional complications. First, he said, there are many more short deadlines in bankruptcy. Second, bankruptcy is heavily impacted by statutory deadlines, including the many deadlines set forth in the Bankruptcy Code and state statutes. Third, he

explained, the bankruptcy advisory committee had been extremely active recently in publishing a large number of rules changes and making wholesale revisions in the bankruptcy forms in order to implement the omnibus 2005 bankruptcy legislation. In light of all the proposed changes already underway, he said, more rule changes at this point would impose an additional burden both on the advisory committee and on the bankruptcy bench and bar.

Judge Kravitz suggested the possibility of proceeding with the time-computation changes in the civil, criminal, and appellate rules at this point, but delaying any changes to the bankruptcy rules. This approach would not be ideal, though, since it would make the bankruptcy rules inconsistent with the other rules for a while. Nonetheless, it might be the most practical approach in light of the sheer volume of rule changes being presented to the bankruptcy community.

Judge Kravitz noted that a good deal of angst had been expressed at the last Standing Committee meeting over the issue of changing the method of counting time limits fixed in statutes. He noted that, except for the criminal rules, the federal rules specify that the method of counting time applies to national rules, local court rules, and statutes. In addition, he said, case law in bankruptcy holds that the counting method prescribed by the bankruptcy rules applies when counting deadlines set forth in statutes. Professor Morris noted the additional complexity that the Rules Enabling Act does not extend its supersession authority to the bankruptcy rules.

Judge Kravitz noted that the feedback received from the bar – other than the bankruptcy bar – is that lawyers generally do not rely on the counting method specified in the federal rules when calculating statutory deadlines – unless they miss a deadline and have to argue to a court for additional time. Therefore, although statutory deadlines are a concern to the rules committees, a large body of the bar does not in fact rely on the two-tiered rules method for counting statutory deadlines. He added that the subcommittee was considering preparing a list of the most common short statutory deadlines that actually arise in court proceedings and then drafting a package of legislative amendments for Congress to consider. He noted that the chair had raised the issue of potential statutory amendments, on a preliminary basis, with leadership of the former Congress and had received a good reception.

Judge Kravitz noted another complication flowing from the text of the current rule. FED. R. CIV. P. 6(a) specifies a method for computing time for both rules and statutes. The next subdivision of the rule, FED. R. CIV. P. 6(b), gives a court authority to extend deadlines for cause, but it applies on its face only to rules, not statutes. He said that the committee might want to give a court explicit authority for good cause shown to extend a deadline set forth in a statute.

Judge Kravitz concluded that the committee needed to make three decisions:

(1) whether to keep moving forward and present a package of amendments to the Standing Committee in June 2007 for publication; (2) whether to include the bankruptcy rules in that package or defer them for publication at a later date; and (3) whether to amend the rules to give a court explicit authority to grant extensions of statutory deadlines for good cause shown.

Judge Zilly reported that the Advisory Committee on Bankruptcy Rules had not yet decided whether to make all the time-computation changes at its March 2007 meeting. The committee, he said, had been very much concerned about further publication of rule changes and possible confusion in light of the proposed changes to 40 rules just published in August 2006. Moreover, he said, a substantial number of the bankruptcy rules would be impacted by the time-computation changes – many of them the same rules that had just been published. He added, though, that it would be relatively easy for the advisory committee to make all the changes, adding that it would make the changes in the revised rules out for publication, rather than in the existing rules. The advisory committee, he said, would not ask for an extension of time, and it could have the changes ready for the June 2007 Standing Committee meeting. But, he explained, the key decision was whether to risk creating confusion by publishing another large package of bankruptcy rule changes on the heels of a comprehensive package of changes approved by the Judicial Conference in September 2006 to implement the 2005 legislation.

As for statutory deadlines, Judge Zilly reported, the advisory committee had identified 10 statutes imposing short time limits in bankruptcy cases, most of them deadlines of 5 days. One approach, he said, would be to specify in the bankruptcy rules that the existing counting method will continue to be used for those specific code sections. An alternative would be to ask Congress to change all the 5-day deadlines to 7 days in order to reflect the new counting method, because 5 days actually means 7 days under current bankruptcy case law. He said that some additional confusion had been added in the 2005 bankruptcy legislation because Congress had used the term "business days" in a couple of sections, but not in other places.

Judge Levi suggested that the bankruptcy advisory committee should discuss all these matters further at its March 2007 meeting. He saw no problem with delaying the changes in the bankruptcy rules for a year or two in light of the practical difficulties and confusion that might result from publishing additional bankruptcy changes now.

One member pointed out that proposed template FED. R. CIV. P. 6(a) mandates that all time periods be computed according to Rule 6. Thus, the rule would trump any other time period specified in the federal rules, any statute, local rule, or court order. Thus, he questioned the purpose of proposed Rule 6(a)(4), defining the end of the last day of a time period "unless a different time is set by statute, local rule, or court order." Judge Kravitz and Professor Struve responded that the provision takes account of 28

U.S.C. § 452, which states that all federal courts "shall be deemed always open for the purpose of filing proper papers . . . . " Some court decisions, they noted, have held that section 452 and FED. R. CIV. P. 77(a) (district courts always open) permit a paper to be filed after hours by handing it to a judge or clerk at their home. In addition, Judge Kravitz noted that some courts maintain a box at the courthouse for lawyers to drop pleadings after hours. He explained that Rule 6(a)(4) was designed to deal with the ordinary course of events, and it does not address explicitly a court's authority to permit after-hours filings under the statute. The language "unless a different time is set by statute, local rule, or court order" was intended to leave room for particular courts to treat issues of after-hours filing as they see fit.

One member suggested that the last sentence of the first paragraph of the committee note was not needed. It specifies that a local rule of court may not direct that a deadline be computed in a manner inconsistent with Rule 6(a). He said that this might imply that other local rules can conflict with the national rules, given that the same limitation on local authority is not repeated in every other committee note. Judge Kravitz responded that the subcommittee simply wanted to emphasize the importance of national uniformity and to make it clear that local rules cannot alter the time-computation method specified in the new rule. But, he said, if the sentence causes any confusion, it could be eliminated. Another member suggested substitute language for the committee note that would reiterate the general principle that local rules may not conflict with national rules, but point out that a court may specify a time for the end of the last day.

Another member said that the proposed rule does not work in counting backwards when the last day of a time period is one in which the clerk's office is inaccessible. Under the proposed rule, one must continue to count backwards. This produces the impossible result that if the office is not accessible, the filing is due yesterday. As a matter of logic, one should count forward to the next accessible day, rather than continue to count backwards. Professor Struve responded that the subcommittee had struggled with that situation and would be open to suggestions for better language. Judge Kravitz cautioned, however, that it would be difficult for the rule to deal with every conceivable situation.

Professor Capra pointed out that there are no time-computation provisions and no relevant time deadlines in the Federal Rules of Evidence. Thus, he asserted, there was no need for the proposed time-computation template rule to be added to the evidence rules. He added that, nevertheless, the evidence advisory committee could draft a variation of the template rule and include it as FED. R. EVID. 1104. But, he said, time computation issues do not arise in evidence, and there is no need for any provision in the evidence rules.

Judge Levi suggested that it would be helpful to have the sense of the Standing Committee that the time-computation project is beneficial before asking the advisory committees to proceed with proposing specific amendments.

**The committee without objection by voice vote agreed to encourage the advisory committees to proceed with the project.**

PANEL DISCUSSION ON THE DECLINE IN THE NUMBER OF CIVIL TRIALS

The committee participated in a panel discussion on the decline in the number of civil trials and whether anything can, or should, be done to amend the federal rules to address the phenomenon. The panel was moderated by Patricia Lee Refo, Esquire of Snell & Wilmer in Phoenix – a prominent member of the Arizona bar and the American Bar Association and a former member of the Advisory Committee on Evidence Rules. The other panelists were: Judge Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit, former chair of the Advisory Committee on Civil Rules; Professor Stephen C. Yeazell of the University of California at Los Angeles Law School; and Justice Andrew D. Hurwitz of the Supreme Court of Arizona, a member of the Advisory Committee on Evidence Rules.

Ms. Refo distributed a series of tables and charts documenting the "vanishing trial." She showed that from 1962 to 2005, the number of civil cases disposed of by the federal district courts increased more than five-fold, but the number of civil trials actually decreased by a third. Bench trials have declined by 45% since 1985, and consent civil trials by magistrate judges have decreased by nearly 50% since 1996. As a result, the percentage of civil cases resolved by a trial has dropped from 11.5% in 1962 to the current rate of 1.4%.

She showed tables breaking out cases by nature of suit. Civil rights cases are the most likely category of civil cases to go to trial in the federal courts, counting for 33% of all civil trials in 2002. Nevertheless, only 3.8% of civil rights cases were decided after a trial. Tort cases accounted for 23% of all civil trials in 2002, although only 2% of tort cases went to trial. And in 2005, she said, almost no contract cases went to trial.

She noted that fewer cases are being terminated during the course of a trial, and the data strongly suggest that trials are not increasing in length. She noted, too, that the decline in trials has also occurred in criminal cases, though for different reasons. She pointed out that during the same time period that trials have declined, the country has experienced substantial population growth and increases in gross domestic product, the number of lawyers, the number of pages in federal court opinions, and the number of pages in the Federal Register. Finally, she showed a table demonstrating that civil trials have also declined noticeably in the state courts.

Judge Higginbotham reported that in the early 1970s, federal district judges were conducting over 30 trials per judge each year, many more than today. Even so, the time for filing to trial was shorter than it is now. Although there has been a decline in both bench and jury trials, he noted, there has been a reversal in the proportions between the two. Bench trials used to predominate by 2-1, but jury trials now outnumber bench trials by 2-1. In criminal cases, he said, the number of guilty pleas has increased substantially, as a direct result of the additional power given to prosecutors over charging decisions by the federal sentencing guidelines.

Judge Higginbotham attributed the decline in trials to the growth of the "administrative model" of decision-making – a set of administrative alternatives to the traditional civil trial. He traced this trend to enactment of the Administrative Procedure Act in 1946, regularizing administrative decision-making in the executive branch, leading to great growth in administrative law judges and an administrative, bureaucratized approach to case-by-case decision-making. He said that the trend began to spread to the federal judiciary in the 1970s with the growth of the federal magistrate judges system. Since then, the court system itself has been moving more and more to this kind of administrative, bureaucratized decision-making, as part of which judges have adopted a series of procedures designed to avoid trials. In this sense, trials are not "vanishing," but moving – from the traditional approach to an administrative model. He noted that most observers account for this phenomenon, including the decline of trials, by pointing to the high costs of civil litigation in the federal courts, the fear of juries, and the indeterminacy of the judicial process.

He warned that this trend has dangerous effects. Lawyers and judges, he said, used to focus on fact questions and present them to the jury at trial. Outcomes, therefore, tended to depend very closely on the applicable normative standards of law. But now, the system has abandoned trials in order to focus on settlements, which are strongly affected by factors other than normative standards. The system, thus, has distanced itself from normative standards of law.

He complained that courts have become hostile to the trial of cases. He referred to two seminars for judges in which the faculty had expressed the attitude that a trial represents a "failure" of the system. The judges were instructed by the faculty to work hard at obtaining settlements. An agreed-upon settlement is seen as better than a trial. In addition, there is now a much greater focus on alternative dispute resolution. He acknowledged that a settlement in the face of an impending trial may be perfectly acceptable – because it will be strongly influenced by normative standards of law – but not a settlement that occurs in the absence of any likelihood that there will ever be a trial.

Judge Higginbotham pointed out that the federal court system has been a great success because of its fairness, independence, and transparency. But, he said, there is a fundamental lack of transparency in both settlements and arbitration. Discovery

materials, moreover, are not filed. Ms. Refo added that many cases that used to be disposed of with bench trials have now migrated to arbitration for largely this reason, because the parties do not have to reveal information to the public. Judge Higginbotham lamented that the courts have validated and embraced arbitration.

Professor Yeazell said that most of what would need to be done to produce a substantially increased rate of trials probably lies beyond the power of the rules process to affect. He strongly endorsed Judge Higginbotham's comments regarding the lack of transparency in settlements and the resulting diminishment of the integrity and legitimacy of the legal system. He noted, though, that it might be possible to address the transparency problem to some extent through rules.

He emphasized two points based on the empirical data presented by Ms. Refo. First, he said, the rate of trials has also been dropping in the state courts. But the rate of trials in state courts is still several times higher than in the federal courts, including the 35 states that use the federal rules as their procedural code. That, he said, leads one to believe that the principal causes of the decline lie in something beyond the federal rules and what rule changes might accomplish.

Second, he noted that the federal sentencing guidelines, with all their perceived defects, are superior to civil settlement practices as far as transparency is concerned. A criminal defendant, he said, may not think that his sentence is fair, but he knows that it will be probably the same sentence that the defendant in the next courtroom receives for the same offense.

That consistency, however, is simply not the case with civil settlements. There are enormous differences from case to case. The results may well be acceptable in individual cases because they are based on the consent of the parties. But for the legal system as a whole, the lack of uniformity and norms is very troubling. He pointed out that a great deal of research has been undertaken in this area. In these studies, a standard set of facts is given to experienced judges, lawyers, and insurance representatives, and they are asked what the case should settle for. They all believe that they know from experience the value of a case. But the settlement figures they produce are in fact very different from each other. And the differences among similar cases are compounded by the lack of transparency, as no one really knows what other similar cases have settled for.

Professor Yeazell said that this is one problem that the rules process might be able to address in some manner. The justice system ought to be able to provide some notion of what similar cases have settled for. The federal rules might provide that settling parties must register, in some form, the outcome of a settlement in order to provide some notion to third parties regarding the range of settlement outcomes. This would bring about a greatly needed increase in transparency, and it may be something that could properly be done within the ambit of the Rules Enabling Act. The philosophy would be

that however much some parties may want to keep outcomes private, this level of transparency would be the price – and an appropriate price – of entering the civil justice system.

Ms. Refo pointed out that there are now certain categories of cases in which trials never take place. Accordingly, a civil litigator has no benchmarks to determine what a case is worth or what the risks of trial may be. As a result, settlements are uninformed, and the uncertainty is a factor in the decline of civil trials.

Judge Hurwitz suggested that trying to pinpoint the causes for the decline in trials is akin to distinguishing between the chicken and the egg. The most important factor in the decline of trials, he said, is cost. He noted that when he and his colleagues used to try cases 30 years ago, they routinely tried small cases at low cost. Today, he said, the cost of litigation is so high that lawyers no longer try any small cases. They have become non-trial lawyers. As a result, a trial is scary to them because they have no experience in trying cases. So it is hard to tell whether uncertainty is the cause or the other factors that have led to the uncertainty. All have been combined to create a culture that avoids trials and views them as a failure. He noted from his personal experience in Arizona that many distinguished candidates applying for state judgeships have had many years of legal experience, but no trials.

Justice Hurwitz noted that trials in state courts are also decreasing, but they are declining at a lesser rate than in the federal courts. He suggested that the perceived unfriendliness of the federal forum is responsible in part for chasing cases from the federal courts into the state courts. He said that a civil case can normally be tried in the Arizona state courts in one year – a much shorter time than in the federal court. So, when plaintiffs have a choice of forum, they will normally choose the state court. Many of the cases, moreover, will remain in the state courts and not be removed to the federal court. He explained that when a case is filed in the federal court, it is randomly assigned to one of 13 very busy district judges, some of whom do not come from a civil background. On the other hand, in Maricopa County, a complex civil case in state court will be assigned to a judge with substantial civil trial experience. That special procedure of guaranteeing experienced judges for complex cases also offers an attractive choice for plaintiffs.

Judge Higginbotham observed that there is a clear relationship between the decline in the number of trials and the increase in the amount of time it takes to get a case to trial. He noted the example of a federal district judge in Texas who receives an unusually large number of patent cases because he is able to bring them to trial very quickly. The attraction for the bar is the certainty that the judge will give them a firm trial date and a good trial.

Justice Hurwitz raised the fundamental question of whether the decline in civil trials is really a bad thing at all. Surely, he said, fewer lawyers today are able to try a

civil case, but maybe all those small civil cases that used to be tried in the past would have been better resolved through settlement. In the past, moreover, lawyers almost never asked for summary judgment in small cases. He said that the legal culture had changed fundamentally, and it may be that not much can be done to change it through the rules process. He suggested that judges and lawyers may be overly nostalgic. Just because they liked the good old days does not mean that the system should return to them.

Ms. Refo pointed out that it was very difficult to conduct empirical research in this area, but her sense was that corporate America has lost confidence in jury results. She said that jury trials cost too much, and the results are too uncertain. She said that consideration might be given to two possible rules changes. First, the pretrial rules might be amended to move the parties to trial faster and more efficiently. Second, something might be done through rules changes to improve the fact finding at trials.

Judge Higginbotham said that the emphasis today is on summary judgment, rather than trial. He said that the traditional way of running a docket is the most effective. The judge makes key decisions early in the case after asking the lawyers when the case will be ready for trial. The judge sets a real trial date, and the parties concentrate on moving forward towards it. If the case is complex, the judge and the parties focus on the specific questions that are going to be asked in front of the jury, rather than on the details of the discovery process. The lawyers and the judge focus on the trial as the end target and work backwards from there. He recognized that most civil cases will settle in any event, but the whole process, he said, should be refocused from discovery to the trial.

As for juries, he said, all the literature proves that a 12-person jury is much more reliable than a smaller jury. He noted that the Standing Committee had approved an amendment to the civil rules that would have mandated a return to 12-person juries in civil cases, but it was not approved by the Judicial Conference. Ms. Refo added that the American Bar Association had issued jury principles in 2005 that urge a return to 12-person juries, and it is actively encouraging the states to return to 12-person juries.

Judge Higginbotham also pointed out that substantive developments have had an impact on the decline in trials, particularly punitive damages. The uncertainty of a jury result has been intensified by the very real fear of substantial punitive damages. He noted that court decisions have been cutting back on punitive damages, but the risk of them continues to deter corporations from opting for a jury trial. Corporate officers, he concluded, generally do what they are told to do by their lawyers, most of whom have not tried any cases themselves.

He suggested that the federal district courts are losing their distinctiveness and are becoming part of a bureaucratic enterprise. The phenomenon presents a serious challenge to Article III of the Constitution and to judicial independence. Increasingly, he

said, trial judges are becoming processors of paper, and the court system has become more of an administrative process than a trial process. The bureaucratization, moreover, feeds on itself. He noted that the federal sentencing guidelines in criminal cases have contributed to uniformity in sentencing, but they have created a large bureaucracy in Washington that produces a large volume of manuals and statistics. He noted that the sentencing guidelines have led to substantially more appeals in federal criminal cases, but he pointed out that the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) was very helpful because the Supreme Court has helped to put the focus back on the jury.

Ms. Refo asked the panelists to compare state court rules with the federal rules to see whether any differences might be of help in revitalizing trials in the federal courts. For one thing, she noted, Arizona requires much broader disclosure in civil cases. And it has different rules on how trials are conducted, including a provision allowing juries to ask questions.

Justice Hurwitz said that the Arizona state rules were basically similar to the federal rules, but a number of innovations in Arizona might help the federal courts, at least at the margin. The size of the jury, he said, is a factor, but most plaintiffs do not want a 12-person jury. He noted that in the state court, unlike the federal court, the parties can pick the judge. Guaranteeing federal lawyers that they will get an experienced judge would be a very helpful improvement, but he noted that there is a price to pay for it in terms of judicial independence.

One of the members echoed the observation that there is a culture of hostility to trying cases – both in the federal courts and the state courts. He noted that substantial pressure had been placed on him by judges to settle, even in cases that have deserved to go to trial. He also noted that it takes much too long to reach trial in the federal court, and cases go to trial much more quickly in the state courts. Clients, he said, are resistant to waiting so long and facing uncertainty.

He noted that Arizona had organized a specialized civil court division for complex civil cases – as in New York, Delaware, North Carolina, and California – staffed by very experienced, highly regarded judges. The state bar, he said, has made the decision not to remove cases to federal court because they are pleased to have them stay in the complex civil division of the state courts. He noted that the judges in the special court conduct an early pretrial conference to lock in all dates. They also impose limits on disclosure and discovery that would otherwise apply in normal civil cases. The bar believes that the system works, at least in complex civil cases, both for plaintiffs and defendants. He noted that a similar system works very well in California.

Another member suggested that lawyers on both sides see state courts as much more lawyer-friendly places than federal courts. Federal courts are seen as very formal,

and the lawyers do not have an opportunity to see the judge in person until late in the process. Another difference between the state and federal courts is that the lawyers get to select the jury in state courts, a matter of great importance to them.

Judge Rosenthal observed that the Advisory Committee on Civil Rules had drafted a set of simplified procedural rules to expedite smaller federal cases and provide prompt, economical trials. Under the proposal, parties opting into the simplified rules would be guaranteed a prompt trial, less discovery, fewer motions, and fewer expert witnesses. But, she said, when the advisory committee floated the idea, it encountered resistance from virtually every quarter. She said that the draft rules had substantial merit, and the advisory committee might wish to revisit them. She noted, too, that specialized rules are becoming more common in certain kinds of cases, such as patent cases.

One member suggested that the courts lose a great deal if complex civil cases vanish from the judicial system. He noted that California, Arizona, and New York make special provision for complex civil cases, including special courtrooms and training for the judges. One of the dangers of settlements, he said, that there is no development of stare decisis and no transparency in the system. Large cases simply are diverted to alternative dispute resolution, and small cases remain in the courts, creating a dual system of justice. Corporations, he said, need to see themselves as stakeholders in the court system. Because of the special efforts now being made in some states, lawyers and corporations are preferring to keep complex civil cases in the state courts, rather than removing them to the federal courts or turning to arbitration or other alternative dispute resolution.

Another member echoed the theme that it is bad for the country when litigants believe that the court system is more of a dispute resolution mechanism than a justice system. It is also wrong, he said, when lawyers and clients believe that a judge will punish them for not settling a case and when corporations choose private litigation over the court system. The net result, he said, is that the judicial system is losing social capital. One of the foundations of the American judicial system, he emphasized, is that the public participates in it. But that participation has been declining, as courts have reduced the number of jurors used in civil cases and have reduced the number of trials. He suggested that there may be problems in the future when the courts need public support.

Ms. Refo noted that, as a practical matter, lawyers today almost never try a case. Associates, moreover, never get fired for taking depositions or serving interrogatories. They can only get in trouble for not taking depositions or serving interrogatories. In effect, the culture encourages too much discovery. She added that the system as a whole has lost a great deal through the growth of private litigation. Among other things, she said, great strides have been made to diversify the federal bench. The same development,

however, has not occurred in private litigation, as only white males seem to preside. That, she said, is another hidden cost to the system.

Judge Higginbotham added that the privacy implications of discovery are a serious problem. He said that there is a value in openness and important social benefits in trials. Cases, he said, do not belong solely to the litigants. Even in private litigation, he said, the parties want discovery. What they want to avoid is public disclosure of their records and activities.

One participant noted that his court is moving towards allowing fewer matters to be filed under seal. On the one hand, he said, disclosure of documents and depositions may encourage parties to leave the court system for private litigation. But on the other hand, there is also a fundamental value in openness and public records.

One member said that his clients increasingly are resisting arbitration. The arbitration alternative, he said, was sold to parties on the basis of its being cheaper and faster. But, he said, it is neither. Moreover, decisions in arbitration usually involve the arbitrator splitting the baby, and there is no appeal from the decision. As one suggestion for change, he said that the committee might want to consider amending 28 U.S.C. § 1292(b) to allow more decisions to be brought to the courts of appeals.

NEXT COMMITTEE MEETING

The next meeting of the committee will be held in Washington, D.C. on June 11-12, 2007.

Respectfully submitted,

Peter G. McCabe,
Secretary