COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 18-19, 1998
Santa Fe, New Mexico

Minutes

The midyear meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Santa Fe, New Mexico, on Thursday and Friday, June 18-19, 1998. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Alan C. Sundberg, Esquire
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Deputy Attorney General Eric H. Holder, Jr. represented the Department of Justice and attended part of the meeting. He was accompanied by Deborah Smolover and Stefan Cassella of the Department. Judge John W. Lungstrum participated as a liaison from the Court Administration and Case Management Committee.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; and Mark D. Shapiro, deputy chief of that office.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Professor Richard L. Marcus, special reporter to the Advisory Committee on Civil Rules, participated in the meeting and shared in the presentation of the advisory committee's report.

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, project director of the local rules project; Thomas E. Willging and Marie Leary of the Research Division of the Federal Judicial Center; and Jean Ann Quinn, law clerk to Judge Stotler.

INTRODUCTORY REMARKS

Changes in Committee Membership

Judge Stotler introduced Mr. McCartan and welcomed him to his first meeting as a committee member. She reported that her own term on the committee and that of Mr. Sundberg were due to expire on October 1, 1998. She expressed great satisfaction that the Chief Justice had just named Judge Anthony J. Scirica to succeed her as committee chair on October 1, 1998. She also congratulated Chief Justice Veasey on his imminent succession to the presidency of the Conference of Chief Justices. Following committee tradition, all the members, participants, and observers introduced themselves in turn and made brief remarks.

March 1998 Judicial Conference Action

Judge Stotler reported that the Judicial Conference at its March 1998 meeting had adopted the recommendation of the Advisory Committee on Criminal Rules that the Conference oppose pending legislation that would reduce the size of the grand jury. She added that the Director of the Administrative Office had sent a letter on behalf of the Conference to Representative Goodlatte, sponsor of the legislation, stating the reasons for opposition.

Judge Stotler stated that the Conference had discussed proposals to remove the current prohibition in 18 U.S.C. § 3060 and FED. R. CRIM. P. 5(c) preventing a magistrate judge from granting a continuance of a preliminary examination in the absence of consent by the defendant.

Although the Magistrate Judges Committee had recommended that the Conference seek an amendment to the statute, it was suggested during Conference deliberations that the better course would be to follow the rulemaking process and amend Rule 5(c). Judge Stotler emphasized that this procedural matter had demonstrated the need for close coordination with other committees of the Judicial Conference on legislative proposals.

Judge Stotler reported that she had written a letter to Mr. Mecham, Director of the Administrative Office, expressing concern over a growing tendency in the Congress to pursue legislation that would amend the federal rules directly or otherwise circumvent the Rules Enabling Act. She noted, for example, that several provisions in the pending, comprehensive bankruptcy legislation — especially sections dealing with bankruptcy forms — reflected unfamiliarity with the rulemaking process established by the Act.

Judge Stotler said that she had acknowledged to Mr. Mecham the success of the Administrative Office's legislative efforts to protect the rulemaking process and deflect harmful statutory proposals. She had also urged greater interchange and dialog between the Legislative Affairs Office of the Administrative Office and the advisory committees, as well as additional dialog with both members and staff of the Congress.

Judge Stotler noted that Judge Niemeyer would represent the rules committees at the June 29, 1998 meeting of the long range planning committee liaisons of the Judicial Conference. She emphasized that defending the Rules Enabling Act process was a priority goal of the committee's long range planning process. Other long range planning priorities of the committee included restyling the federal rules and addressing the impact of technology on the rules.

Judge Sear reported that he had appeared at Judge Stotler's request on behalf of the committee before the ad hoc committee of the Judicial Conference studying: (1) the respective mission and authority of the Federal Judicial Center vis a vis the Administrative Office in education and training; and (2) the advisability of creating a special mechanism to resolve disputes between the two organizations. He stated that the ad hoc committee had emphasized that the Judicial Conference is the policy-making body for the judiciary, and that the Federal Judicial Center is the judiciary's primary educational body, but that the Adminis-trative Office needs to maintain its own educational programs. He added that an interagency coordinating committee of senior managers of the two agencies had been formed to resolve disputes, but it was not expected that there would be a need for the committee to meet.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 8-9, 1998.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 28 bills and three joint resolutions were pending in the Congress that would affect the rules process. Summaries of each of the provisions, he noted, were set forth in the agenda report of the Administrative Office. (Agenda Item 3A) He added that 11 letters had been sent to the Congress on these legislative provisions expressing the views and concerns of the rules committees, and in some cases those of the Judicial Conference.

Mr. Rabiej stated that Judge Davis, chair of the Advisory Committee on Criminal Rules, had testified before the House Judiciary Subcommittee on Crime on proposed legislation that would amend FED. R. CRIM. P. 46 to authorize forfeiture of a bail bond only if the defendant fails to appear as ordered by the court.

He reported that the House had passed H.R. 1252. Section 3 of that legislation, now pending in a separate bill in the Senate, would authorize an interlocutory appeal of a decision to grant or deny certification of a class action. He pointed out that Judge Niemeyer had written to Senators Hatch and Leahy urging that they oppose section 3 on the grounds that: (1) it would achieve substantially the same results as new Rule 23(f) approved by the Supreme Court and due to take effect on December 1, 1998; and (2) it suffered from drafting problems that would introduce confusion and generate satellite litigation. He expressed confidence that if the legislation proceeded further, section 3 would either be eliminated or converted to a provision accelerating the effective date of new Rule 23(f).

Mr. Rabiej noted that S. 1352, introduced by Senator Grassley, would undo the 1993 amendments to FED. R. CIV. P. 30(b) and take away from parties the flexibility to use the most economical method of reporting depositions.

He pointed out that Judge Niemeyer had informed Representative Coble, chair of the House Judiciary Subcommittee on Courts and Intellectual Property, that the Advisory Committee on Civil Rules was planning to publish a proposed abrogation of the copyright rules for comment. At Mr. Coble's request, though, the committee had decided to defer the matter for another year.

Mr. Rabiej reported that the committee had notified Senator Kohl that the advisory committee had completed its discussion of protective orders and had decided to oppose his legislation that would require a judge to make particularized findings of fact before issuing a protective order under FED. R. CIV. P. 26(c). Mr. Rabiej also reported that the Administrative Office was continuing to monitor a bill that would federalize most class actions.

Administrative Actions

Mr. Rabiej reported that the Administrative Office was ready to place proposed amendments to the federal rules on the Internet for public comment. Some members suggested that the bar should be informed through notices in legal journals and newspapers about the opportunity to send comments electronically regarding the amendments on the Administrative Office's home page.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) She noted that the Center had conducted nearly 1,500 educational programs in 1997 that had reached 41,000 participants. The number of people reached, she said, will increase as a result of the new programs being developed for the Federal Judiciary Television Network.

She mentioned that the Center had more than 40 research programs pending and referred specifically to two of them: (1) a study of mass torts, focusing on policy and case management issues in the settlement of mass torts; and (2) a study on the use of expert testimony, specialized decision makers, and case management innovations in the National Vaccine Injury Compensation Program.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 12, 1998. (Agenda Item 5)

Judge Garwood stated that the advisory committee had approved several proposed amendments at its April 1998 meeting. But the committee had decided not to seek authority to publish the proposals for comment. Rather, it would hold them for publication in 1999 or 2000.

Judge Garwood said that a great deal of praise was due to Judge Logan for his prodigious and very successful efforts in achieving a complete restyling of the appellate rules. He noted that the restyled rules had recently been approved by the Supreme Court and would take effect on December 1, 1998.

Professor Schiltz reported that the advisory committee was considering a number of other potential changes in the appellate rules, but it wanted the bar to become familiar with the new, restyled appellate rules before requesting authority to publish any further proposed

amendments. He added that several of the most recent changes approved by the advisory committee were intended to address complaints by the bar about the proliferation of local court rules. The advisory committee had decided to approve certain national provisions in order to promote national uniformity.

He pointed out that the advisory committee was very supportive of the concept of establishing a uniform effective date for all local rules. He added that it had approved a proposed amendment to FED. R. APP. P. 47(a)(1) that would establish an effective date of December 1 for all revisions to local court rules. The amendment would allow a court to establish a different effective date for a specific rule only if there were an "immediate need" for the rule. It would also provide that a local rule may not take effect until it is received in the Administrative Office. He noted, however, that the Administrative Office wanted an opportunity to study the likely administrative and logistical consequences flowing from the proposal.

Professor Schiltz reported that the advisory committee had announced at the last Standing Committee meeting that its priority long-term project was to consider promulgating uniform national rules on unpublished opinions in the courts of appeals. But, he said, that after careful consideration, the matter was removed from the committee's agenda.

Professor Schiltz also reported that the advisory committee at its last meeting had discussed the desirability of: (1) shortening the length of the Rules Enabling Act process; and (2) permitting public comments on proposed rules amendments to be submitted to the Administrative Office electronically through the Internet. He said that the consensus of the Advisory Committee on Appellate Rules was that the Rules Enabling Act process is too long, but it did not have specific recommendations to shorten it. With regard to Internet comments, the advisory committee favored the proposal.

He said that the advisory committee had also addressed whether there was a need for national rules governing attorney conduct. He noted that a national standard of conduct was set forth in FED. R. APP. P. 46, that the rule had worked well, and that the advisory committee was not aware of serious problems with attorney conduct in the courts of appeals. He added that the advisory committee would be pleased to appoint members to serve on an ad hoc committee to consider attorney conduct, but the committee had no special expertise in this area. He also pointed out that some members of the advisory committee had expressed reservations regarding the proposed draft national rules on attorney conduct. He noted that they were broad in scope, and some of them went beyond conduct related to federal court proceedings. They governed, for example, conduct in a law office, such as confidentiality of client matters. Members of the advisory committee had also expressed concern as to possible limits on the authority of the rules committee to promulgate rules in this area.

Judge Stotler asked Judge Garwood and Professor Schiltz to share these comments and any other reservations of the advisory committee with the reporters of the other rules committees.

Professor Coquillette noted for the record that he personally did not advocate adoption of the 10 illustrative federal attorney conduct rules. He noted that he had been asked as reporter to prepare them only as a model of what national rules might encompass. He said that any set of national rules that the Standing Committee might adopt could be narrower than the 10 draft rules. He added that there was substantial support for a single national rule or a very small number of national rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier presented the report of the advisory committee, as set forth in his memorandum and attachments of May 11, 1998. (Agenda Item 6)

Rules Amendments for Judicial Conference Approval

Judge Duplantier reported that the advisory committee was recommending that the Judicial Conference approve proposed amendments to 16 rules. The proposals had been published in August 1997. The advisory committee had considered the comments at its March 1998 meeting and was now seeking final approval of the amendments.

Professor Resnick stated that seven of the 16 amendments dealt with the issue of an automatic 10-day stay of certain bankruptcy court orders which, if not stayed, could effectively moot any appeal by the losing party. Three of the amendments dealt with narrowing certain notice requirements. Several of the remaining amendments, he said, involved technical matters.

10-Day Stay Provision

FED. R. BANKR. P. 7062 and 9014

Professor Resnick explained that FED. R. BANKR. P. 7062, which applies to all adversary proceedings, incorporates FED. R. CIV. P. 62 by reference and imposes a 10-day stay on the enforcement of all judgments. The advisory committee would not change this provision.

Bankruptcy Rule 9014 governs contested matters, which are initiated by motion. It specifies that Rule 7062 (and Civil Rule 62) apply to contested matters, unless the court directs otherwise. But Rule 7062 — the adversary proceeding rule — sets forth a laundry list of

specific categories of matters, added piece by piece over the years, that are excepted from the 10-day stay provision, all of them contested matters.

Professor Resnick said that the current structure and interaction of these rules was awkward, and it had caused problems in application. As a result, the advisory committee had appointed an ad hoc subcommittee to take a fresh look at the operation and effect of the 10-day stay on all types of contested matters.

After considerable study, the subcommittee and the full advisory committee concluded that it was appropriate to restructure the rules and separate the procedures for adversary proceedings from those for contested matters. First, it had decided to eliminate from Rule 9014 the reference to FED. R. BANKR. P. 7062 (and Civil Rule 62). Second, it would remove the list of excepted contested matters from Rule 7062. As a result, the rules would provide that orders in contested matters — unlike orders in adversary proceedings — would become effective upon issuance, and there would be no 10-day stay.

The committee decided, however, that there were a few types of contested matters to which the 10-day stay should apply as a matter of policy. Professor Resnick explained that the committee had concluded that it was best to relocate the stay provisions for these matters to the specific rules governing these contested matters.

FED. R. BANKR. P. 3020

Professor Resnick noted that Rule 3020 governs confirmation of a plan. He explained that the law today is ambiguous as to whether the court's confirmation order is stayed automatically. The advisory committee would amend the rule to make it clear that an order confirming a plan is stayed for 10 days after the entry of the order to allow a party to file an appeal. He added, though, that a bankruptcy judge would have discretion not to apply the 10-day stay in an individual case, or to shorten the length of the stay.

FED. R. BANKR. P. 3021

Professor Resnick stated that the proposed change in Rule 3021 was a technical amendment conforming to amended Rule 3020 and the 10-day stay of an order confirming a plan.

FED. R. BANKR. P. 4001

Professor Resnick stated that the proposed amendment to Rule 4001, dealing with relief from the automatic stay under section 362 of the Bankruptcy Code, was the most controversial proposal contained in the package of published amendments. He explained that, under the proposed revision, the parties would have 10 days to file an appeal from a judge's

order granting a motion for relief from the automatic stay unless the judge ordered immediate enforcement.

He noted that the advisory committee had received 13 letters during the public comment period addressing this provision, the majority of which had expressed opposition to the amendment. Several commentators were concerned that it would not be fair to give a debtor — who is defeated on a creditor's motion to lift the automatic stay under section 362 of the Bankruptcy Code — an additional automatic 10 days enjoyment of the premises or automobile that is the subject of the lift-stay motion. Professor Resnick said that the advisory committee had debated the merits of the matter carefully and had voted to proceed with the amendment on the merits. He added that the moving party may always ask for immediate enforcement of an order lifting the stay, and the court has authority to include a provision for immediate enforcement in its order.

FED. R. BANKR. P. 6004

Professor Resnick explained that Rule 6004 governs court orders authorizing the use, sale, or lease of property. He said that the most common use of the rule involves application by the debtor to sell assets out of the ordinary course of business. He reported that the advisory committee concluded that this was the type of order that should be stayed for 10 days to allow the losing party to file an appeal. The 10-day stay was necessary because otherwise the holder of the property could sell it immediately to a good faith purchaser and effectively moot any appeal.

FED. R. BANKR. P. 6006

Professor Resnick said that the advisory committee proposed a similar provision in Rule 6006. He explained that the assignment of an executory contract was akin to a sale of property under Rule 6004, and an order authorizing the assignment should be stayed for 10 days to allow an appeal before the assignment is consummated.

Professor Resnick said that the proposed amendments to rules 3020, 3021, 4001, 6004, and 6006 were based on considerations of fundamental fairness. The advisory committee was aware of the need for finality of judgments but, on balance, it believed that it was necessary to establish a presumption of a 10-day stay in these discrete categories of contested matters in order to prevent a party's right of appeal from being mooted.

Some of the members expressed concern over the proposed amendments on the ground that they would delay time-sensitive matters and shift the burden from the losing party to the successful moving party. They stated that in ordinary civil litigation, there are not the same time-sensitive considerations as in bankruptcy.

Professor Resnick explained that ordinarily in civil cases there is a 10-day stay of all judgments. The proposed amendments to the bankruptcy rules, however, would provide a general rule that there is no 10-day stay in contested matters. But the above amendments to Rules 3020, 3021, 4001, 6004, and 6006 were designed as specific exceptions to the general rule. Moreover, the moving party can always ask the judge to waive the 10-day stay on the grounds that there is time sensitivity in a given case. In other words, in the specified excepted categories of contested matters the proposed amendments give the losing party 10 days to appeal the judgment, as under FED. R. CIV. P. 62.

The committee approved the proposed amendments to Rules 3020, 3021, 4001, 6004, and 6006 by a vote of 8 to 4. It approved all the other proposed amendments without objection.

B. Other Proposed Amendments

FED. R. BANKR. P. 1017

Professor Resnick stated that Rule 1017 currently provides that when a motion to dismiss is made — either for failure of the debtor to file schedules or for failure to pay the filing fee — the clerk must send notice of the motion to all creditors. He explained that the advisory committee had been asked by the Administrative Office to save money by considering limits on the amount of noticing to be performed by the clerk. The proposed amendment would have the clerk serve notice of the motion only on the debtor, the trustee, and such other entities as the court may direct.

A new subdivision 1017(c) would be added to specify the parties who are entitled to receive notice of the motion to dismiss. Professor Resnick explained that without the new subdivision there would be a gap in the rules, in that there would be no way to ascertain who must receive notice of the motion.

Professor Resnick pointed out, however, that in the new "litigation package" of amendments recommended by the advisory committee for publication, the substance of Rule 1017(c) would be moved to Rule 9014 as part of a general restructuring of the rules dealing with litigation and motion practice. Accordingly, if the litigation package were to become law on schedule, the new subdivision 1017(c) would remain in effect for only one year.

The advisory committee, he said, was very sensitive to the general policy of avoiding frequent changes in the rules, especially when changes are proposed in the same rule. Nevertheless, if the litigation package were not to become law, the change in Rule 1017(c) would be needed permanently.

FED. R. BANKR. P. 1019

Professor Resnick stated that Rule 1019 governs conversion of a case from chapter 11, 12, or 13 to chapter 7. He noted that there is uncertainty in practice as to what document should be filed by one seeking to recover preconversion administrative expenses. Therefore, the advisory committee would amend subdivision (6) to specify that a holder of an administrative expense claim incurred after commencement of the case but before conversion must file a request for payment under section 503 of the Code, rather than a proof of claim. Notice of the conversion would be given to the administrative expense creditors.

He noted that the advisory committee had made a change in the rule following the public comment period by deleting a deadline for filing requests for payment of preconversion administrative expenses that would be applicable in all cases. Instead, the rule would have the court fix the deadline.

FED. R. BANKR. P. 2002

Professor Resnick reported that the proposed change in Rule 2002(a)(4) conformed the rule to the changes proposed in Rule 1017.

FED. R. BANKR. P. 2003

Professor Resnick stated that Rule 2003(d) deals with disputed elections of chapter 7 trustees. He explained that Rule 2007.1 — which governs disputed elections of chapter 11 trustees — was better written and clearer. Accordingly, the advisory committee had chosen to conform the language of Rule 2003 to that of Rule 2007.1.

FED. R. BANKR. P. 4004

Professor Resnick reported that the language of Rule 4004(a) would be amended to clarify that a complaint objecting to discharge must be filed within 60 days after the first date set for the meeting of creditors, whether or not the hearing is held on that date. Rule 4004(b) would be amended to specify that a motion to extend the time for filing a complaint objecting to discharge must be "filed," rather than "made."

FED. R. BANKR. P. 4007

Professor Resnick explained that Rule 4004 governs denial of a discharge, while Rule 4007 governs the dischargeability of a particular debt. He said that the proposed changes in Rule 4007 were parallel to those proposed in Rule 4004.

FED. R. BANKR. P. 7001

Professor Resnick pointed out that under the present rule, a request for injunctive relief requires the filing of an adversary proceeding. But in practice an injunction is often embodied in a chapter 11 plan, and adversary proceedings are not in fact commenced. The advisory committee proposed conforming the rule to the practice and provide explicitly that an adversary proceeding is not necessary to obtain injunctive or other equitable relief, if that relief is specified in a chapter 9, 11, 12, or 13 plan.

Professor Resnick stated that Department of Justice representatives had expressed reservations to the advisory committee that the proposed amendment did not provide adequate procedural protections to all parties that might be affected by injunctive relief. They suggested, for example, that injunctive relief provisions might be embedded in plans that parties would likely not see or recognize in the absence of an adversary proceeding.

Deputy Attorney General Holder and Professor Resnick added that the Department had been discussing the matter with the advisory committee. As a result, its initial objections had now been withdrawn with the understanding that Mr. Kohn of the Department would be presenting the advisory committee at its October 1998 meeting with proposed procedural protections for inclusion in other bankruptcy rules.

FED. R. BANKR. P. 7004

Professor Resnick stated that the proposed change in Rule 7004(e) would provide that the 10-day limit for service of a summons does not apply to service made in a foreign country.

FED. R. BANKR. P. 9006

Professor Resnick reported that the proposed change in Rule 9006(b), governing time, was a purely technical amendment that had not been published for public comment. He explained that the rule currently provides that a court may not enlarge the time specified in Rule 1017(b)(3). But since the advisory committee would abrogate Rule 1017(b)(3), the cross-reference in Rule 9006 would need to be eliminated.

The committee approved the proposed amendments without objection. It further voted to approve the amendment to Rule 9006 without publication.

Amendments for Publication

A. Litigation Package

Judge Duplantier reported that the Federal Judicial Center, at the request of the advisory committee, had conducted an extensive survey of the bench and bar in 1995 inquiring as to the effectiveness of the Federal Rules of Bankruptcy Procedure. The survey results had indicated general satisfaction with the rules, but had identified motion practice and litigation in connection with "contested matters" as areas of significant dissatisfaction that needed improvement.

He added that the bar had complained that the national rules had left too many procedures for handling contested matters to local variation. Some of the local rules, moreover, are inconsistent with the national rules. Many local rules, for example, require a response to a motion, even though the national rules do not require a response. In addition, the national rules specify that a motion must be served five days before a hearing on a motion. Local rules, however, often specify different time frames.

The advisory committee, accordingly, undertook to address in a comprehensive manner the problems of litigation and motion practice. Judge Duplantier stated that the project had proven to be very complex and controversial. The committee had appointed a special subcommittee, which worked for two years to produce a package of proposed amendments. In turn, the full advisory committee addressed the proposals at four meetings, and it had approved a package of amendments that it believed would provide substantially better guidance and national uniformity for the bar. He added, however, that two members of the advisory committee had dissented on the proposals, largely on the grounds that they believed that litigation and motion practice should be left to local practice.

Professor Resnick added that the terminology currently used in the Federal Rules of Bankruptcy Procedure is confusing. He pointed out that the proposed amendments would not affect "adversary proceedings," which are akin to civil law suits in the district courts and are governed largely by the Federal Rules of Civil Procedures. Rather, they would govern the handling of proceedings that are presently called "contested matters."

"Contested matters," generally, are proceedings commenced by motion that initiate litigation unrelated to other litigation that may be pending in a bankruptcy case. But they are not akin to the kinds of motions filed in the district courts, which typically involve matters within a pending civil action. Rather, they embrace such subjects as the rejection of an executory contract, relief from the automatic stay, requests to obtain financing, and the appointment of a trustee in a chapter 11 case.

Professor Resnick said that the purpose of the proposed amendments is to provide greater guidance and uniformity in handling these important matters. At the same time, the amendments would allow more routine, non-contested matters to be resolved quickly, and normally without a hearing. The advisory committee's general restructuring would, thus, create three principal categories of bankruptcy proceedings: (1) adversary proceedings, governed by Part VII of the rules; (2) motions, governed by amended Rule 9014; and (3) applications, governed by amended Rule 9013.

The proposed amendments to Rules 9013 and 9014, he said, constituted the heart of the proposed package of amendments.

FED. R. BANKR. P. 9013

The amended Rule 9013 would establish a new category of proceedings called "applications," consisting of the 14 specific categories of matters set forth in subdivision 9013(a). These proceedings are normally non-controversial and unopposed, and the rule would allow them to be handled quickly and inexpensively. Included, for example, are such matters as motions to jointly administer a case and motions for routine extensions of time.

Rule 9014 would be the default rule. Accordingly, if a matter were not specifically listed as an application in subdivision (a), it would be governed by Rule 9014 or another rule expressed designated in Rule 9014(a).

Subdivision 9013(b) sets forth the requirements for requesting relief by application, and subdivision (c) specifies the manner of service. An application need not be served in advance and may be served at the same time that it is presented to the court. Service may be made in any manner by which a motion may be served under the bankruptcy rules, including service by electronic means, if authorized by local rule. Professor Resnick pointed out that the provision for electronic service represented an advance over FED. R. BANKR. P. 5005, which authorizes electronic means only for the filing of papers with the court.

A member of the committee asked why the advisory committee had chosen the term "application," rather than "motion." He pointed out that FED. R. CIV. P. 7 states explicitly that "an application for an order shall be by motion." Professor Resnick responded that the civil rules and the bankruptcy rules simply do not use the same terminology. He noted that a difference is made in bankruptcy between applications and motions. An application, in effect, is something less significant than a motion.

FED. R. BANKR. P. 9014

Professor Resnick explained that Rule 9014, as amended, would create a new category of proceedings called "administrative proceedings." They include more complex matters than applications and are more likely to be contested. Yet they do not require all the procedures of adversary proceedings under Part VII of the bankruptcy rules.

Subdivision 9014(a) carves out certain proceedings from the scope of Rule 9014, including involuntary bankruptcy petitions, petitions to commence an ancillary proceeding under section 304 of the Bankruptcy Code, bankruptcy appeals, adversary proceedings, and motions within adversary proceedings.

Professor Resnick stated that Rule 9014(b) provides that a request for relief in an administrative proceeding must be made by written motion entitled an "administrative motion." Unless made by a consumer debtor, the motion must be accompanied by supporting affidavits.

Rule 9014(c) governs service and provides that a copy of an administrative motion must be served at least 20 days before the hearing date on the motion. A response to the motion must be filed at least five days before the hearing. These dates currently are governed by local rules, which vary substantially from district to district. The proposed amendment to Rule 9014(c) also specifies the entities that must receive notice of the motion. Service may be made by any means by which a summons may be served or by electronic means if authorized by local rule. If the respondent fails to respond to the motion, the court may issue an order without a hearing.

Professor Resnick said that subdivision 9014(h) provides that the discovery provisions of the Federal Rules of Civil Procedure would be made applicable in administrative proceedings, with two exceptions: (1) the initial disclosure provisions of FED. R. CIV. P. 26(a); and (2) the requirement of a meeting of the parties under FED. R. CIV. P. 26(f). In addition, the 30-day time periods specified in the civil discovery rules, *i.e.,* FED. R. CIV. P. 30(e), 33(b)(3), 34(b), and 36(a), would be reduced to 10 days in order to expedite the processing of administrative proceedings.

Under subdivision 9014(i), witnesses would not be brought to an initial hearing. Professor Resnick explained that local rules of court currently contain great variations on this point. Under the proposed national rule, the court would conduct a hearing on the specified hearing date to determine whether there is a material issue of fact or law. The judge at that time would determine whether there is a need for an evidentiary hearing.

The amended rule provides that no testimony may be given at the initial hearing unless the parties consent or there is advance notice. If the court finds that there is an issue of fact, the hearing becomes a status conference. The evidentiary hearing would be held at a later date.

The rule, however, provides exceptions for certain time-sensitive matters, such as relief from the automatic stay and preliminary hearings on the use of cash collateral or obtaining credit.

Professor Resnick pointed out that the proposed new subdivision 9014(j) would make FED. R. CIV. P. 43 inapplicable at an evidentiary hearing on an administrative motion. The advisory committee, he said, had decided as a matter of policy that live testimony, rather than affidavits, should be required at the hearing. He added that new subdivision 9014(l) specifies several of the Part VII adversary proceeding rules that would apply to administrative proceedings.

Finally, subdivision 9014(o) would operate as a safety valve and would authorize the court, for cause, to change any procedural requirements of the rule. But it requires the court to give the parties notice of any proposed changes in the requirements.

OTHER RULES

Professor Resnick reported that the advisory committee had determined that a few proceedings in the bankruptcy courts simply did not fit well into one of the three major categories of adversary proceedings, administrative motions, and applications. Therefore, it had excluded these proceedings from Rule 9014(a) and would have them governed by other specific rules. He offered as examples FED. R. BANKR. P. 2014, which would prescribe special procedures for the employment of an attorney, and FED. R. BANKR. P. 3020, which would govern the confirmation of a chapter 11 plan.

Professor Resnick explained that most of the remaining amendments in the litigation package were conforming changes to accommodate the provisions of Rules 9013 and 9014.

Judge Duplantier asked the Standing Committee to approve:

(1) publishing the proposed litigation package, consisting of amendments to FED. R. BANKR. P. 1006, 1007, 1014, 1017, 2001, 2004, 2007, 2014, 2016, 3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001, 6004, 6006, 6007, 9006, 9013, 9014, 9017, 9021, and 9034 ;
(2) publishing the accompanying commentary to the amendments, entitled, *Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice*, as a guide to bench and bar*;* and
(3) providing a five-month public comment period from August 1, 1998, to January 1, 1999.

Professor Resnick noted that the litigation package included amendments to 27 different rules. He said that the volume of the changes made it difficult to follow without an

explanation focusing on the heart of the changes, set forth in Rules 9013 and 9014. Therefore, the advisory committee's accompanying commentary had been prepared to assist the Standing Committee and the public during the publication period. It was not intended to become a permanent committee note.

The committee approved the litigation package and the accompanying commentary for publication without objection. It also approved the proposed five-month public comment period without objection.

Other Rules Amendments

Judge Duplantier reported that the advisory committee recommended publication of changes in several other rules, three of which deal with providing notice to government entities.

Government Notice Provisions

FED. R. BANKR. P. 1007

Professor Resnick stated that Rule 1007 requires the debtor to file schedules and statements. The proposed amendments to Rule 1007(m) would provide that if the debtor lists a governmental unit as a creditor in a schedule or statement, it must identify the specific department, agency, or instrumentality of the governmental unit through which it is indebted. Failure to comply with the requirement, however, would not affect the debtor's legal rights.

FED. R. BANKR. P. 2002

Professor Resnick stated that when the government is a creditor, the debtor must mail notices both to the pertinent government department and the United States attorney. He noted that the Department of Justice had complained that the United States attorney normally receives notices, but frequently does not know which government agency is involved. Accordingly, the proposed amendment to Rule 2002(j)(5) would require that the appropriate governmental department, agency, or instrumentality be identified in the address of any notice mailed to the United States attorney.

FED. R. BANKR. P. 5003

The proposed amendments to Rule 5003, dealing with records kept by the clerk, would require the bankruptcy clerk to maintain a register of the mailing addresses of federal and state governmental units within the state where the court sits.

Professor Resnick stated that concern had been expressed that if updates to the register were too frequent, lawyers might not have the latest edition at hand. Pending legislation in the House of Representatives would require the clerks to maintain a register and update it quarterly. The advisory committee, however, had decided that annual updates were sufficient.

The proposed amendment would not require the clerk to list more than one mailing address for any agency. But the clerk may do so and include information that would enable a user of the register to determine which address is applicable.

The mailing address listed on the register would be presumed conclusively to be the correct agency address. But failure by the debtor to check the register and use the proper address would not invalidate a notice if the agency in fact received the notice. Thus, the register would serve as a "safe harbor." A debtor who used it would be protected, and a debtor who did not would act at its own peril.

Other Provisions

FED. R. BANKR. P. 1017

The proposed amendment to Rule 1017, dealing with dismissal or conversion of a case, would authorize the court to rule on a timely-filed request for an extension of time to file a motion to dismiss a case for substantial abuse, whether or not it ruled on the request before or after expiration of the 60-day deadline specified in the rule.

FED. R. BANKR. P. 2002

Professor Resnick explained that the proposed amendment to Rule 2002(a)(6), dealing with notices, would provide an adjustment for inflation. Under the current rule, notice of a hearing on a request for compensation or expenses must be given if the request exceeds $500. The rule has remained unchanged since 1987. The advisory committee would raise the threshold amount to $1,000.

FED. R. BANKR. P. 4003

Professor Resnick said that the proposed amendment to Rule 4003, dealing with exemptions, was very similar to that proposed in Rule 1017. A party currently has 30 days to object to the list of property claimed as exempt by the debtor unless the court extends the time period. Case law has held that the court must actually rule on the extension request within the 30-day period. The amendment would permit the court to grant a timely request for an extension of time to file objections to the list, as long as the request is made within the 30-day period.

FED. R. BANKR. P. 4004

Professor Resnick explained that the proposed change to Rule 4004, dealing with the grant or denial of discharge, is a technical one, designed to conform to the proposed change in Rule 1017(e). It would provide that a discharge will not be granted if a motion is pending requesting an extension of time to file a motion to dismiss the case for substantial abuse.

The committee voted to approve the above amendments for publication without objection.

Proposed Amendments to the Official Forms

OFFICIAL FORMS 1 AND 7

Professor Resnick stated that the reasons for the proposed changes to the Official Forms were set forth at Tab 6D of the agenda book.

The committee voted to authorize publication of the amendments to the Official Forms without objection.

National Bankruptcy Review Commission Recommendations

Professor Resnick reported that the advisory committee was studying the recommendations contained in the October 1997 report of the National Bankruptcy Review Commission. He noted that the report was more than 1,300 pages long and contained 172 recommendations, some of which called specifically for changes in the Federal Rules of Bankruptcy Procedure and were addressed to the advisory committee.

Judge Duplantier noted that the Committee on the Administration of the Bankruptcy System was taking the lead for the Judicial Conference in preparing and coordinating responses to the Commission's various recommendations. It had referred a number of recommendations to the Advisory Committee on Bankruptcy Rules, which in turn had decided that it would not take a position on any Commission recommendations that called for substantive changes in the Bankruptcy Code as a precedent to rules amendments. Several of the recommendations, however, called on the advisory committee to make changes in the rules and forms independent of legislative action. The advisory committee concluded that the appropriate response was to recommend that the provisions of the Rules Enabling Act be followed with regard to such rules-related recommendations.

Professor Resnick also pointed out that many of the Commission's recommendations called for substantive changes in the Bankruptcy Code. In addition, he said, comprehensive bankruptcy legislation is pending in the Congress that would change many of the substantive

provisions of the Code. He said that legislative enactment of these provisions would require the advisory committee to draft amendments to the bankruptcy rules to implement the statutory changes.

Judge Sear moved to adopt the recommendations of the advisory committee regarding the report of the National Bankruptcy Review Commission. **The committee voted to approve the recommendations without objection.**

Informational Items

Judge Duplantier reported that the advisory committee had considered the issue of establishing a uniform effective date for local rules. It concluded that the issue was not very important, but that if a single date were chosen, it should be December 1 of each year. It also concluded that a safety valve should be provided in the rule to take care of emergencies and newly-enacted legislation.

Professor Resnick reported that the advisory committee had considered the proposal to permit the public to comment on proposed rule amendments by e-mail. It favored implementing the proposal for a trial period, but was of the view that e-mail comments should be treated the same as written comments.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of May 18, 1998. (Agenda Item 7)

Amendments for Judicial Conference Approval

FED. R. CIV. P. 6

Professor Cooper reported that the proposed change to Rule 6, dealing with computing time, was purely technical. He explained that a conforming amendment was needed in Rule 6(b) to reflect the abrogation of Rule 74(a) in 1997. The rule would be amended to delete its reference to Rule 74(a). He added that since the change was technical, there was no need to publish it for public comment.

FORM 2

Professor Cooper reported that paragraph (a) of Form 2 sets forth an allegation of jurisdiction founded on diversity of citizenship. It asserts that the matter in controversy exceeds $50,000. But the governing statute, 28 U.S.C. § 1332, had been amended to raise the

diversity jurisdiction threshold amount to its current level of $75,000. The advisory committee recommended that the language of Form 2 be amended to refer to the statute itself, rather than to any specific dollar amount.

Professor Cooper added that the advisory committee was of the view that this, too, was a technical change that did not require publication.

The committee approved the amendments to Rule 6 and Form 2 without objection and voted to forward them to the Judicial Conference without publication.

Amendments for Publication

Discovery Package

Judge Niemeyer reported that the advisory committee had been debating discovery issues for several years. Among other things, it had considered proposed amendments to FED. R. CIV. P. 26(c) as an alternative to pending legislation that would narrow or restrict the use of protective orders. More importantly, the committee had to address the impact on the district courts of the expiration of the Civil Justice Reform Act of 1990. Specifically, it had to decide whether the 1993 amendments to the civil rules — largely inspired by the Act and authorizing local variations in pretrial procedures — should be continued permanently or amended in certain respects.

The advisory committee had appointed a special discovery subcommittee — chaired by Judge David F. Levi and staffed by Professor Richard L. Marcus as special reporter — to study these issues and to take a comprehensive look at the architecture of discovery itself. Judge Niemeyer said that the subcommittee had been asked to address such matters as whether discovery is too expensive in light of its contribution to the litigation process. And, if it is too expensive, are there changes that could be made that would preserve the existing system, which promotes disclosure of information, yet produce cost savings? He added that the subcommittee had also been asked to consider restoring greater national uniformity to the rules by eliminating or reducing local "opt out" provisions authorized by the 1993 amendments.

Judge Niemeyer reported that the advisory committee had conducted an important conference at Boston College Law School with leading members of all segments of the bar, interested organizations, the bench, and academia. It had also asked the Federal Judicial Center to conduct a survey of lawyers on discovery matters. The data from that survey showed that about 50% of the cost of litigation is attributable to discovery, and that in the most complex cases that percentage rises to about 90%. The lawyers responded that discovery was very expensive, and 83% of them stated that they favored certain changes in the discovery rules. In particular, they expressed support for providing: (1) greater access to judges on discovery matters; and (2) national uniformity in procedures.

Judge Niemeyer reported that there had been a consensus among the participants at the Boston College conference that:

1. Full disclosure of relevant information is an important element of the American discovery system that should be preserved.

2. Discovery works very well in a majority of cases.

3. In those cases when discovery is actively used, both plaintiffs and defendants believe that it is unnecessarily expensive. Plaintiffs complain that depositions are too numerous and expensive, and defendants complain most about the costs of document production, including the costs of selection, review to avoid waiver of privileges, and reproduction.

4. Where initial mandatory disclosure is being used, it is generally liked and is generally seen as reducing the cost of litigation.

5. National uniformity is strongly supported, and the local rule options authorized by FED. R. CIV. P. 26 should be eliminated.

6. The cost of discovery disputes could be reduced by greater judicial involvement.

7. The costs of document production are attributable in large part to the review of documents necessary to avoid waiver of the attorney-client privilege. Costs could be reduced if there could be a relaxation of the waiver rules for discovery purposes. (The advisory committee, however, was initially of the view that because privileges are generally governed by state law, it might be difficult to address this matter through the federal civil rules.)

8. Discovery costs could be reduced by imposing presumed limits on the length of depositions and the scope of discovery, particularly with regard to the production of documents.

9. An early discovery cutoff date and a firm trial date are the most effective ways of reducing costs. (The advisory committee concluded, however, that this matter could best be addressed by the Court Administration and Case Management Committee and by education of judges, rather than by rule amendments.)

Judge Niemeyer stated that the special discovery subcommittee had considered a wide variety of ideas and had presented the advisory committee with several different options. The central goal was to reduce the costs of discovery without undercutting the basic principles of open disclosure of relevant information. The advisory committee considered all the

alternatives and concluded that any package of amendments that it would propose should be designed to enjoy general support from both plaintiffs and defendants.

He added that the political aspects of changes in the discovery rules were very important. Plaintiffs and defendants simply do not agree on some procedural matters. Nevertheless, the advisory committee was of the view that the package it had selected was very well balanced and fairly addressed the concerns of both sides. Judge Niemeyer reported that the advisory committee had chosen to proceed with proposals on which the vote was unanimous or represented a strong majority. On close votes, the committee either dropped the proposal or modified it to satisfy a significant majority.

Judge Niemeyer explained that the package adopted by the advisory committee did not reduce discovery. Rather, it would narrow attorney-managed discovery and make some of it court-managed discovery. The committee's proposal would limit attorney-managed discovery under FED. R. CIV. P. 26(b) to any matter, not privileged, that is relevant to a claim or defense of a party. Broader discovery of matters relevant to "the subject matter involved in the pending action" would still be available to the parties, but only on application to the court.

A proposed amendment to FED. R. CIV. P. 34(b) would authorize the court to limit discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party. Judge Niemeyer reported that the special discovery subcommittee had recommended placing that provision in Rule 26, but the full advisory committee decided to retain it as an amendment to Rule 34. It also decided to include a note on the matter in the publication and invite public comment on the proper placement of the provision.

One of the members expressed strong opposition to the proposed changes, especially the amendment limiting the scope of attorney-managed discovery, and he described the amendments as "revolutionary." He said that they would "throw out" the present discovery system, which was well understood by the bar and had worked very well, and replace it with a system that required judges, rather than lawyers, to make discovery decisions. He also strongly objected to the amendment to Rule 34 authorizing the court to order cost sharing, which he described as "cost shifting." He predicted that defense lawyers would routinely challenge discovery requests by plaintiffs and seek to shift the costs of discovery to the plaintiffs.

Professor Cooper stated that the discovery subcommittee had not been discharged. It would continue to consider other matters, including the advisability of providing limited initial disclosure of documents without waiving attorney-client privileges in order to reduce the burdens of document production and a presumptive age limit on the production of documents. It would also explore whether it would be practicable to develop discovery protocols or guidelines for various kinds of civil cases.

Professor Cooper also reported that the advisory committee had decided not to proceed further with proposals to amend the protective order provision of FED. R. CIV. P. 26(c).

Several members of the committee complimented the advisory committee and its discovery subcommittee on producing a well-researched, carefully-crafted, and objective package of amendments that, they said, managed to accommodate many difficult and competing considerations and achieve national uniformity. They said that although they might have reservations about individual provisions in the proposed discovery package, they favored publication of all the proposed amendments.

Judge Niemeyer asked Professor Marcus to describe the proposed amendments to each of the rules.

FED. R. CIV. P. 5

Professor Marcus stated that the proposed amendment to Rule 5(d) would provide that discovery materials need not be filed until they are used in a proceeding or the court orders that they be filed. He explained that the rule had been amended in 1980 to authorize a court to order that discovery materials not be filed with the clerk of court. Before that time, they had been filed routinely with the courts.

He reported that by the late 1980's about two thirds of the district courts had promulgated local rules prohibiting the filing of discovery materials generally. The Standing Committee's Local Rules Project had concluded that these rules were inconsistent with the national rules but had suggested consideration of amendment of the national rule. He added that the Judicial Council of the Ninth Circuit had recently recommended that Rule 5(d) be amended to authorize local rules to prohibit the filing of discovery materials, but the advisory committee had decided not to pursue that course of action.

Instead, the advisory committee had decided to propose a national rule that would excuse the filing of discovery materials and supersede existing local rules. The proposed Rule 5(d), which includes disclosures under Rule 26(a)(1) or (2) as well as discovery information, would provide that these materials "need not be filed." The committee note makes it clear that deposition notices and discovery objections would be covered by the rule. But medical examinations under Rule 35 would be unaffected by the amendment. Professor Cooper added that although discovery responses need not be filed under the proposed amendment, they could be filed if a party wished to file them.

Some members of the committee stated that clerks of court were experiencing serious space problems and that the filing of discovery materials would create burdens and costs for the courts. They suggested that the national rule be amended to prohibit the filing of all

discovery materials except with court permission. Professor Marcus responded that public access to discovery materials was a controversial matter. Moreover, some lawyers wanted to reserve the opportunity to file certain materials with the clerk.

Judge Niemeyer noted that when Rule 5(d) had been amended in 1980, the press had expressed opposition on the grounds that the amendment would restrict its access to "court records." He added that the advisory committee had been concerned that a national rule banning the filing of discovery materials might provoke similar controversy and impede eventual passage of the amendment. Accordingly, it had decided to make only a modest change that would allow, but not require, parties to file materials.

Several members of the committee stated, however, that there was no requirement that discovery materials be made public, since they are not part of the public record unless actually used in a case. Justice Veasey moved to substitute the words "must not be filed" for the words "need not be filed" in line 7 of the proposed amendment to Rule 5(d). **The committee voted to approve the substitution without objection.**

Two of the members suggested that the proposed amendment include a provision placing an explicit responsibility on attorneys to preserve discovery materials. Other members stated, however, that local rules and case law adequately cover this matter.

The committee approved the proposed amendment for publication with one objection.

FED. R. CIV. P. 26

Professor Marcus reported the advisory committee had decided as a matter of policy to seek national uniformity in the rules regarding initial disclosures under Rule 26(a). He pointed out that mandatory disclosure was a controversial matter among the bench and bar, with strong views expressed both for and against it. He said that the advisory committee had considered three options: (1) to make the current Rule 26(a)(1) mandatory in all districts; (2) to abrogate Rule 26(a)(1) and preclude initial disclosure everywhere; or (3) to fashion a form of disclosure that would be nationally acceptable.

The advisory committee chose the third course. To that end, the proposed amendments to Rule 26(a)(1) would limit a party's disclosure obligation to materials "supporting its claims or defenses." Professor Marcus emphasized that the revised rule would promote national uniformity by eliminating the explicit authority of a court under the current rule to opt out of the disclosure requirements by local rule.

Two members questioned whether the phrase "supporting its claims or defenses" was broad enough to cover information that controverted an opponent's claims or defenses. They

noted that this issue had been addressed in the committee note, but suggested that more comprehensive language might be incorporated in the rule itself. Professor Cooper responded that the advisory committee had deliberately chosen the language to be consistent with language already used elsewhere in the discovery rules. He pointed out, for example, that FED. R. CIV. P. 26(b), which defines the scope of discovery, refers only to "claims and defenses." He added that claims and defenses includes denials, but not impeaching materials.

One of the members suggested publishing alternative language on the scope of disclosure and soliciting public comment on the two versions. Judge Niemeyer responded that the advisory committee was of the view that only one version should be published for comment.

Professor Marcus stated that subparagraph 26(a)(1)(E) sets forth a list of 10 categories of civil actions that would be exempt from the initial disclosure requirements of the rule. He explained that discovery would be an unnecessary burden in these types of cases. He also pointed out that, after consulting with the chair and reporter of the Advisory Committee on Bankruptcy Rules, the two bankruptcy exceptions set forth as items (i) and (ii) in the subparagraph were unnecessary. Accordingly, Judge Niemeyer, Professor Cooper, and Professor Marcus suggested eliminating them from the proposed amendment.

Some of the members asked whether the list of exemptions in Rule 26(a)(1)(E) was accurate and complete. Professors Marcus and Cooper responded that the advisory committee expected to use the public comment process to refine the list further. They noted that the publication would flag the issue and ask for public comment on whether the types of civil cases listed were proper for exclusion, whether they were properly characterized, and whether other categories of cases should also be excluded.

Professor Marcus pointed out that the parties would be given 14 days, rather than 10 days, following the conference of attorneys under Rule 26(f) to make the required disclosures. Later-added parties would have to make their disclosures within 30 days, unless a different time were set by stipulation. And minor changes would be made in paragraphs 26(a)(3) and (4) to conform with the proposed changes in Rule 5(d) on the filing of disclosure materials.

Professor Marcus said that the proposed amendments to Rule 26(b)(1) would limit attorney-controlled discovery. But the court would have authority to permit discovery beyond matters related to the claims or defenses of a party. The language would be amended to make it clear that evidence sought through discovery must be relevant, whether or not admissible at trial. He pointed out that a new sentence had been added at the conclusion of paragraph (b)(1) to call attention to the limitations on excessive or burdensome discovery imposed by subdivision 26(b)(2)(i), (ii), and (iii).

Professor Marcus pointed out that the amendments to Rules 26(d) and 26(f), dealing with the timing and sequence of discovery and the conference of the parties, were linked. The language of both provisions would be amended to exclude "low end" cases, *i.e.*, the categories of cases exempted from initial disclosure requirements under Rule 26(a)(1)(E). He added that the amended rule would require that the conference of the parties under Rule 26(f) be held seven days earlier than currently in order to give the court more time to consider the report and plan arising from the conference. The amended rule would no longer require a face-to-face meeting of parties or attorneys, but a court could by local rule or order require in-person participation.

The committee approved the proposed amendments, with the change to Rule 26(a)(1)(E) described above, for publication with one objection.

FED. R. CIV. P. 30

Professor Marcus stated that Rule 30(d)(2) would be amended to limit the duration of depositions. Unless otherwise authorized by the court or stipulated by the parties and the deponent, a deposition would be limited to one day of seven hours. The rule would also be amended to include non-party conduct within the rule's prohibition against individuals impeding or delaying the examination.

Some of the members expressed doubts that a uniform limit on the length of depositions would be effective in practice, especially in multi-party cases. They noted that many variables had to be considered, and attorneys often do not have control over the course of their own depositions. They suggested that time limits on depositions would be difficult to regulate by rule and would best be left to the attorneys and discovery plans. Professor Marcus responded that there had been a strong majority on the advisory committee for making the change. Many attorneys have complained that overlong depositions result in undue costs and delays. Professor Cooper added that Rule 26(b)(2) currently authorizes a court to impose limits on the number and length of depositions. Moreover, a court would retain the power to extend a deposition on a party's request.

One member recommended that the amended rule require that the party taking the deposition notify the deponent 10 days in advance which documents would be the subject of interrogation, that the moving party send the deponent pertinent documents in advance, and that the deponent be required to read the documents before taking the deposition. Some of the members agreed with the substance of the recommendation, but they suggested that the matter was one that should be left to good practice and trial strategy, rather than national rule. Judge Niemeyer added that the member's point was well taken, but that lawyers had told the advisory committee that the problem of unprepared witnesses rarely arose with experienced attorneys. In addition, there was a concern that deponents would be swamped with unrealistic volumes of documents submitted to protect any possible opportunity for use. Therefore, the advisory

committee had decided not to include in the amendments an express requirement that the deponent read certain documents in advance.

The committee approved the proposed amendments for publication by a vote of 6 to 4.

FED. R. CIV. P. 34

Professor Marcus stated that the proposed amendment to Rule 34(b) would provide that when a discovery request exceeds the limitations of Rule 26(b)(2), the court could limit the discovery or require that the requesting party pay part or all of the reasonable expenses of producing it.

One of the members strongly objected to this provision, stating that it would be used routinely by defense counsel to shift costs to plaintiffs, thereby driving many poor or economically-limited litigants out of the court system. He said that it would alter the entire philosophy of federal practice and should be rejected. He added that the courts already had the power to limit discovery and should not be given the authority to impose costs on the parties requesting discovery, except in very large cases.

But another member disagreed, countering that the "discovery" problem was real and needed to be addressed. He said that the proposed advisory committee amendment was neutral and applied equally to defendants and plaintiffs. He added that it was inappropriate to characterize it as an attempt to drive poor litigants out of the court system.

One member observed that the proposed amendments to Rules 26(b) and 34(b) would establish two different regimes of discovery, which might be denominated as "regular discovery" and "supplemental discovery." The former would be self-executing and without cost to the requesting party. The latter, though, would require court approval and could entail the payment of costs by the requesting party. Judge Niemeyer agreed with this characterization.

Judge Niemeyer added that the advisory committee would invite public comment on whether the cost-bearing provision was properly placed as an amendment to Rule 34(b) or should be added to Rule 26(b)(2), dealing with discovery scope and limits.

The committee approved the proposed amendments for publication by a vote of 7 to 3.

FED. R. CIV. P. 37

Professor Marcus pointed out that the proposed change in Rule 37, dealing with sanctions, would add a cross-reference to Rule 26(e)(2). This would close a gap left by the 1993 amendments to the rules and authorize sanction power for failure to supplement discovery responses.

The committee approved the proposed amendment for publication without objection.

Service on the United States

Judge Niemeyer reported that the advisory committee had received a request from the Department of Justice to allow additional time for the government to respond in cases when an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with the performance of official duties. The committee agreed with the Department's position and recommended publishing proposed amendments to Rules 4 and 12.

FED. R. CIV. P. 4

Professor Cooper stated that when an officer of the United States is sued in an individual capacity, the proposed rule would give the officer 60 days in which to answer. Subparagraph 4(i)(2)(A) would govern service in cases when an officer of the United States is sued in an official capacity. Subparagraph 4(i)(2)(B) would govern service of an officer sued in an individual capacity for acts or omissions occurring "in connection with the performance of duties on behalf of the United States." Professor Cooper pointed out that the quoted language had been crafted carefully with the assistance of the Department of Justice and was designed to avoid using existing terms such as "color of office" or "scope of employment" or "arising out of the employment," because these terms had developed particular meanings over time.

Under subparagraph 4(i)(2)(B), when a federal officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States, service must be effected on both the officer or employee and the United States. The advantage of requiring service on the United States is that under Department of Justice regulations, the Department ordinarily defends officers sued individually if their acts were committed in the course of United States business.

Professor Cooper explained that new subparagraph 4(i)(3)(B) would allow a reasonable time to correct a service defect. Thus, if a plaintiff served only the affected officer or

employee, additional time would be provided to correct the defect and effect service on the United States.

Deputy Attorney General Holder stated that the rule was beneficial and would provide a single set of clear and understandable rules to govern all suits against the United States.

FED. R. CIV. P. 12

Professor Cooper stated that the proposed changes to Rule 12, dealing with defenses and objections, would provide that a response is due by the United States or an officer or employee sued in an individual capacity within 60 days after service. He added that the Department of Justice needed 60 days to determine whether to provide representation to the defendant officer or employee. Thus, the response time would be the same, whether the officer or employee were sued in an individual capacity or an official capacity.

The committee approved the amendments to Rules 4 and 12 for publication without objection.

Informational Items

Judge Niemeyer provided the committee with a status report on the work of the Working Group on Mass Torts. He said that the issues raised in mass tort litigation were very complex and controversial, and the working group had conducted meetings with some of the most experienced judges, lawyers, and academics in the country. He added that the group was planning on producing a report that would describe mass-tort litigation and identify problems that may deserve legislative and rulemaking attention. He expressed the hope that the report could also present a preliminary blueprint for action by identifying the legislative and rulemaking steps that might be taken to reduce the problems. He expected that the working group force would file a draft report in time for consideration by the Standing Committee at its January 1999 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of May 15, 1998. (Agenda Item 8)

Rules Amendments for Judicial Conference Approval

Judge Davis reported that the Standing Committee had approved publication of proposed amendments to eight rules and the addition of one new rule at its June 1997 meeting. The advisory committee had considered the public comments at its April 1998 meeting and had

conducted a public hearing addressing the proposed amendments on Rule 11 pleas and criminal forfeiture.

FED. R. CRIM. P. 6

Judge Davis stated that there were two amendments proposed in Rule 6, dealing with grand juries. The first, in subdivision 6(d), would authorize the presence of interpreters during deliberations to assist grand jurors who are hearing or speech impaired. He explained that under the current rule, no person other than the grand jurors themselves may be present during deliberations.

As authorized for publication by the Standing Committee, the rule had been broader in scope and would have allowed all types of interpreters to be present with the grand jury. But comments were received that it would not be legal to have interpreters assist jurors who do not speak English, since 28 U.S.C. § 1865 requires that all grand jurors and petit jurors speak English. Accordingly, the advisory committee modified the amendment to permit only interpreters assisting hearing or speech impaired grand jurors to be present during deliberations and voting.

The second amendment would modify subdivision 6(f) to permit the grand jury foreperson to return the indictment in open court. The present rule requires that the whole grand jury be present for the return.

The committee approved the proposed amendments without objection.

FED. R. CRIM. P. 11

Judge Davis and Professor Schlueter pointed out that three changes were proposed in Rule 11, governing pleas. The first would make a technical change in subdivision 11(a) to conform the definition of an organizational defendant to that in 18 U.S.C. § 18.

The second change would amend Rule 11(e)(1) to reflect the impact of the Sentencing Guidelines on guilty pleas. It would recognize that a plea agreement may specifically address a particular sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. The proposed change would distinguish clearly between a plea agreement under subparagraph 11(e)(1)(B), which is not binding on the court, and one under subparagraph 11(e)(1)(C), which is binding once it is accepted by the court.

Some members of the committee expressed concern that the proposal would remove the court further from the sentencing process and give greater authority to the United States attorney and defense counsel. They pointed out, for example, that a judge might accept a plea initially, but later be required to reject it when the facts become known. The case, then, would

have to be tried after considerable delay. Professor Schlueter responded that the advisory committee wanted only to address the reality of the current practice, under which the parties reach an agreement with regard to specific guidelines or factors. He added that a judge may always accept or reject such a plea agreement.

Judge Davis stated that the third proposed change, to Rule 11(c)(6), was also controversial, particularly with defense counsel. It would reflect the increasing practice of including provisions in plea agreements requiring the defendant to waive the right to appeal or to collaterally attack the sentence. The amendment would require the court to determine whether the defendant understands any provision in the plea agreement waiving such rights. A majority of the public comments had opposed the amendment, largely on the grounds that it would be seen as an endorsement of the practice of waiving appellate rights.

Judge Davis pointed out that most courts had upheld the kinds of waivers contemplated in the amendment, and the Criminal Law Committee of the Judicial Conference had recommended the provision to the advisory committee. The advisory committee, however, decided to add a sentence to the committee note stating that: "Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers."

The committee approved the proposed amendment to Rule 11(e) by a vote of 11 to 1. It approved the other amendments to Rule 11 without objection.

FED. R. CRIM. P. 24

Judge Davis reported that the proposed change to Rule 24(c), dealing with trial jurors, would give a trial judge discretion to retain alternate jurors if a juror becomes incapacitated during the deliberations. The current rule explicitly requires the court to discharge all alternate jurors when the jury retires to deliberate.

One member pointed out that the committee note set forth certain procedural protections to insulate the alternate jurors during the deliberative process. It stated that if alternates are in fact used, the jurors must be instructed that they must begin their deliberations anew. He recommended that the latter provision be placed in the language of the rule itself.

Judge Davis agreed to insert additional language in the rule. Accordingly, Judge Stotler asked him and Professor Schlueter to draft appropriate text and present it to the committee later in the meeting.

After consultation with the Style Subcommittee and further committee deliberations, Judge Davis and Professor Schlueter suggested adding the following language at the end of

paragraph 24(c)(3): "If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew."

The committee voted without objection to approve the proposed amendment.

FED. R. CRIM. P. 32.2

Judge Davis reported that the proposed new Rule 32.2 was the heart of a major revamping and reorganization of the criminal forfeiture rules. He noted that the government proceeds in criminal forfeiture on an *in personam* theory. There must be a finding of guilt in order to forfeit property.

He explained that new Rule 32.2 states that no judgment of forfeiture may be made unless the government alleges in the indictment or information that the defendant has an interest in property that is subject to forfeiture in accordance with an applicable statute. Accordingly, a conforming change would be made in Rule 7(c)(2), prescribing the nature and contents of the indictment or information, to make it clear to the defendant that the government is seeking to seize his or her property.

Judge Davis pointed out that paragraph (b)(1) contained the principal change in the criminal forfeiture amendments and had attracted the most comments from the public. The new rule would eliminate any right of the defendant to a jury trial on the forfeiture count. The provision flowed from the decision of the Supreme Court in *Libretti v. United States*, 516 U.S. 29 (1995), where the Court held that criminal forfeiture is a part of sentencing. A defendant, accordingly, is not entitled to a jury trial on the forfeiture count.

The judge would have to make a decision on the nexus of the property to the offense "as soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere." This language would replace current Rule 32.1(e). Under the current rule, after returning a guilty verdict, the jury is required to hear evidence and enter a special verdict on the forfeiture count. Under the proposed rule, however, the jury would be excused once it has returned a guilty verdict, and the court would proceed right away on its own to decide upon forfeiture of the applicable property. The judge may use the evidence accumulated during the course of the trial or in the plea agreement, and it may take additional evidence at a post-trial hearing.

One of the members expressed concern as to whether the new rule afforded the defendant the opportunity to contest an allegation by the government that the property in question had been purchased with drug proceeds. Judge Davis responded that the court has considerable discretion to take evidence at a hearing and allow both sides to present additional evidence. The judge would not be required to hold a hearing, but would surely do so if a party asked for one. And the judge would have to hold a hearing if there were a dispute as to the

facts. A hearing would be held, for example, if the defendant were to claim that he or she had purchased the property legitimately, without using drug proceeds. Professor Schlueter added that the rule was designed to give the trial judge maximum discretion and therefore did not specify all the steps that the judge must follow.

Judge Davis said that if a third party comes forward to assert an interest in the forfeited property, the court must conduct an ancillary proceeding. It would have discretion to allow the parties to conduct appropriate discovery. At the conclusion of the ancillary proceeding, the court must enter a final order of forfeiture. It would amend the preliminary order of forfeiture, if necessary, to account for disposition of the third-party petition.

Judge Davis stated that proposed Rule 32.2(b) contained two principal provisions. First, the court, rather than the jury, would determine whether there is a nexus between the offense and the property. Second, the court would defer until a later time the question of the defendant's interest in the property. Since *Libretti v. United States* had made it clear that criminal forfeiture is a part of sentencing, it makes sense for the judge, rather than the jury, to decide the ownership questions. He added that in most cases defense counsel currently waives a jury trial on forfeiture issues.

He added that subsection (b)(2) covers the situation when the court decides that the nexus between the property and the offense has been established, but no third party appears to file a claim to the property. In that case, the court may enter a final order forfeiting the property in its entirety. He said that the advisory committee had added a proviso after publication that the court must determine, consistent with the *in personam* theory of criminal forfeiture, that the defendant had an interest in the property.

Subsection (b)(3) states that the government may seize the property, and the court may impose reasonable conditions to protect the value of the property pending appeal.

Subdivision 32(c) would require an ancillary proceeding if a third party appears to claim an interest in the property. Paragraph (c)(4) was added following publication to make it clear that the ancillary proceeding is not a part of sentencing. Therefore, the rules of evidence would be applicable. Although the ancillary proceeding was designed to protect the rights of third parties, the defendant would have a right to participate in it. At the conclusion of the proceeding, the court would be required to file a final order of forfeiture of the property.

Subdivision (d) would authorize the court to issue a stay or impose appropriate conditions on appeal. Subdivision (e) would govern subsequently located property. The court would retain jurisdiction to amend a forfeiture order if property were located later. It also could enter an order to include substitute property.

In conclusion, Judge Davis summarized the sequence of events under the new Rule 32.2 as follows: the jury's verdict, a preliminary order of forfeiture by the court, a third party's petition, an ancillary proceeding, and a final order of forfeiture.

Some members pointed out that a defendant has the right to a jury trial in a civil forfeiture proceeding. They expressed concern about taking away the defendant's right to jury trial in criminal forfeiture proceedings, even though that right might not be constitutionally required under *Libretti v. United States.* One member added that he would vote against the proposal, as written, but would be inclined to support it if it retained the right to a jury trial on the single issue of the nexus of the property to the offense.

The committee rejected the proposed amendment by a vote of 7 to 4.

FED. R. CRIM. P. 7, 31, 32, and 38

Judge Davis said that the advisory committee would withdraw the amendments to these rules because they were part of the proposed criminal forfeiture package and were designed to conform to the proposed new Rule 32.2.

FED. R. CRIM. P. 54

Judge Davis stated that the change in Rule 54, dealing with application of the criminal rules, was purely technical. It would eliminate the current rule's reference to the Canal Zone, which no longer exists.

The committee approved the proposed amendment without objection.

Informational Items

Judge Davis stated that the advisory committee had discussed the draft attorney conduct rules at its April 1998 meeting. Some of the lawyer members on the committee, he said, had expressed opposition to the concept of having another set of conduct rules. The advisory committee agreed to appoint two of its members to serve on the ad hoc attorney conduct committee.

FED. R. CRIM. P. 5

Judge Davis reported that the advisory committee had approved a proposed amendment to Rule 5(c) that would authorize a magistrate judge to grant a continuance of a preliminary examination without the consent of the defendant. But, he added, the advisory committee had voted not to seek publication of the amendment until a later date.

He explained that the proposed amendment would conflict with 18 U.S.C. § 3060(c). Therefore, the advisory committee had recommended at its April 1997 meeting that the Judicial Conference seek a change in the statute. The Standing Committee, however, at its June 1997 meeting decided that it would be more appropriate to propose a change to Rule 5(c) through the Rules Enabling Act process. Accordingly, it remanded the matter back to the advisory committee for further action.

At its October 1997 meeting, the advisory committee considered the issue again. It decided not to pursue an amendment to Rule 5(c) and so advised the Standing Committee. The Magistrate Judges Committee, however, presented the issue to the Judicial Conference at its March 1998 session with a request for a change in the statute.

Judge Davis added that the Judicial Conference had considered the matter, and following the Conference session, the chair of the Executive Committee had asked the advisory committee to consider publishing a proposed amendment to Rule 5(c). As a result, the advisory committee approved an amendment at its April 1998 meeting. But it decided not to seek publication on the grounds that: (1) the proposed amendment itself was not crucial, and (2) the committee had begun restyling the body of criminal rules and wished to avoid making piecemeal amendments in the rules until that process had been completed.

Judge Stotler said that the larger issue debated by the Judicial Conference at its March 1998 session was how best to coordinate proposed rules changes with proposed legislative changes. She emphasized that the debate had underscored the need for the rules committees to work closely with other committees of the Conference in coordinating changes that affect both rules and statutes. She added that the Executive Committee had acquiesced in the advisory committee's decision to defer publication of the proposed amendment to Rule 5(c).

FED. R. CRIM. P. 30

Professor Schlueter reported that the advisory committee had published a proposed amendment to Rule 30 that would permit the court to require the parties to submit pretrial requests for instructions. But, he noted, the Advisory Committee on Civil Rules was considering similar changes to FED. R. CIV. P. 51. Therefore the criminal advisory committee had decided to defer presenting the matter to the Standing Committee until further action is taken with regard to proposed amendments to the civil rule.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of May 1, 1998. (Agenda Item 9)

Amendments for Publication

Judge Smith reported that at the January 1998 meeting, the Standing Committee had authorized the advisory committee to publish proposed amendments to FED. R. EVID. 103, 404, 803, and 902. It was understood that these amendments would be included in the same publication as any additional amendments approved at the June 1998 meeting. She added that the advisory committee was sensitive to the need to limit the number and frequency of changes in the rules. Therefore, it did not expect to recommend further amendments for some time, unless required by legislative developments.

Judge Smith said that the decision of the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), had generated a great deal of controversy regarding testimony by expert witnesses. The advisory committee had decided as a matter of policy to delay acting on potential changes in the rules in order to allow sufficient time for case law to develop at both the trial and appellate levels on the impact of the decision. The committee, however, believed that the time was now appropriate to proceed. Accordingly, it voted to seek authority to publish amendments to three rules dealing with testimony of witnesses. She added that all the amendments had been designed to clarify *Daubert*, yet the advisory committee wished to make as few changes as possible in the existing rules of evidence.

FED. R. EVID. 702

Judge Smith stated that Rule 702, governing expert testimony, was the focal point of the *Daubert* decision. The advisory committee simply would add language at the end of the existing rule reaffirming the role of the district court as gatekeeper and providing guidance in assessing the reliability and helpfulness of proffered expert testimony. The amendment would make it clear that expert testimony of all types — scientific, technical, and specialized — are subject to the court's gatekeeping role.

Judge Smith pointed out that the *Daubert* decision had set forth a non-exclusive checklist of factors for the trial courts to consider in assessing the reliability of scientific testimony. The advisory committee had made no attempt to codify these factors, as *Daubert* itself made clear that they were not exclusive. Moreover, case law has added numerous other factors to be considered in individual cases in determining whether expert testimony is sufficiently reliable.

Judge Smith said that the *Daubert* decision also addressed the issue of methodology. It requires a judge to review both the methodology used by the expert and how it has been applied to the facts. She added that application of these factors to expert testimony will necessarily vary from one kind of expertise to another. She emphasized that the trial courts had demonstrated considerable ingenuity and wisdom in applying *Daubert.* The advisory

committee, thus, determined that it was not necessary to set forth any specific procedural requirements in the rule for the trial courts to follow.

Some members expressed concern about the meaning of the terminology "sufficiently based upon," as used in the phrase "the testimony is sufficiently based upon reliable facts or data." Professor Capra explained that the opinion of an expert might be based on reliable information, but it must also be based on sufficient facts or data. The phrase, thus, refers to the quantity, rather than the quality, of the information.

One member questioned whether there was a need to change the rule at all at this point. Professor Capra responded that the advisory committee had been unanimous in favoring amendments to the rule. He noted that the developing case law was inconsistent as to whether *Daubert* applies to all kinds of experts. Moreover, he said, legislation had been introduced in the Congress to modify the rule through legislation. Judge Smith affirmed the need to amend the rule at this point, and she emphasized again that the advisory committee had attempted to change the current rule as little as possible.

FED. R. EVID. 701

Judge Smith reported that the advisory committee would add a clause to the end of Rule 701, which deals with testimony by lay witnesses. The addition would clarify and emphasize the opening clause of the rule, which limits application of the rule to a witness who is not testifying as an expert. The rule then proceeds to state the limits on the testimony of a lay witness. Therefore, the amendment makes it clear that a lay witness may not provide testimony based on scientific, technical, or other specialized knowledge. She added that the advisory committee had been concerned over a growing tendency among attorneys to attempt to evade the expert witness rule by using experts as lay witnesses.

Judge Smith pointed out that representatives from the Department of Justice disagreed with the proposed amendment. They had said that the amendment would conflict with FED. R. CIV. P. 26 and require additional efforts by United States attorneys in providing reports of experts. Ms. Smolover of the Department stated that the agency believed that the amendment would effect a significant change in the law. She added that it attempted to draw a bright line between specialized knowledge and non-specialized knowledge in an area that was especially murky. She proceeded to provide two examples of factual situations where it would be difficult to distinguish specialized knowledge from non-specialized knowledge.

Professor Capra responded that three states currently have evidence rules in place that are similar to the proposed amendment and distinguish sharply between expert and lay testimony. He said that the courts in those states had experienced no difficulties in applying the rules. And, he said, the courts — federal and state — make these kinds of distinctions every day.

Judge Smith added that there may be close calls in some factual situations, but the courts normally handle these distinctions very well. She said that the potential harm that may be caused by attempts to evade Rule 702 greatly outweigh any problems of potential uncertainty in distinguishing between specialized knowledge and non-specialized knowledge in certain cases. Several members of the committee expressed their agreement with Judge Smith on this point.

Judge Stotler asked the trial judges attending the meeting whether they had encountered problems in distinguishing expert testimony from lay testimony. Several of the judges responded that they already applied the law in the manner specified in the proposed amendment, and they had experienced no difficulty in doing so. They expressed strong support for the proposed amendment and stated that it would provide the bar with additional, necessary guidance on distinguishing among categories of proposed testimony and complying with the requirements of FED. R. CIV. P. 26 for an advance written report of expert testimony.

The members proceeded to discuss how the proposed amendment would be applied to a number of hypothetical situations. They generally anticipated few practical problems, but some noted that problems arise with regard to treating physicians. It was pointed out that the committee note to FED. R. CIV. P. 26 states explicitly that a written report of expert testimony is not needed from a treating physician. It was reported by several, though, that some attorneys call treating physicians as observing witnesses under Rule 701, but then attempt to use them as expert witnesses under Rule 702. Professor Capra emphasized that although there are "mixed" witnesses, the committee note accompanying the proposed amendment makes it clear that the rule distinguishes between expert and lay *testimony,* rather than between expert and lay *witnesses.*

FED. R. EVID. 703

Judge Smith reported that the advisory committee had been concerned about a growing tendency to attempt to present hearsay evidence to the jury in the guise of materials supporting expert testimony. Accordingly, the proposed amendment to Rule 703, dealing with bases of opinion testimony by experts, would provide that when an expert relies on underlying information that is inadmissible, only the expert's conclusion — and not the underlying information — would ordinarily be admitted. The trial court must balance the probative value of the underlying information against the safeguards of the hearsay rule, with the presumption that the facts or data upon which an expert bases an opinion or inference will not be admitted.

The committee approved proposed amendments to FED. R. EVID. 701, 702, and 703 for publication without objection.

Informational Items

Professor Capra reported that the advisory committee had approved the suggestion that the use of electronic mail be authorized for transmitting public comments on proposed amendments to the secretary.

He stated that the advisory committee was continuing to consider the impact of computerized evidence on the Federal Rules of Evidence, and it had produced a detailed report on the matter for the chairman of the Technology Subcommittee. The advisory committee had concluded that the courts were simply not having problems in applying the evidence rules to computerized records. Moreover, the committee had determined that it would be very difficult to amend the rules expressly to take account of computerized evidence. It would require changes in many of the rules or the drafting of new and difficult definitional provisions.

Professor Capra noted that Judge Stotler had asked the advisory committee to consider whether FED. R. CIV. P. 44 should be abrogated in light of its overlap with certain of the evidence rules. He explained that the committee had researched the matter in detail, had consulted with the Advisory Committee on Civil Rules, and had concluded that there was not a complete overlap between Rule 44 and the evidence rules. Moreover, there was no indication of any problems in the case law. Therefore, the committee decided not to pursue abrogating the rule.

Professor Capra reported that legislation had been introduced in the Congress to provide for a parent-child evidentiary privilege. The House bill would directly amend FED. R. EVID. 501 to include such a privilege, and the Senate bill would require the Judicial Conference to report on the advisability of amending the Federal Rules of Evidence to include a parent-child privilege. The advisory committee had considered the matter and concluded that the evidence rules should not be amended to include any kind of parent-child privilege.

Professor Capra stated that the proposed privilege would be contrary to both state and federal common law. Moreover, it would not be appropriate to create it by amending the Federal Rules of Evidence, since the Congress had rejected a detailed list of privileges in favor of a common law, case-by-case approach. Professor Capra added that the advisory committee had prepared a proposed response to the Congress to that effect.

Judge Smith said that the Congress had expressed a good deal of interest in privileges in recent years, including a possible rape counselor privilege, a tax preparer privilege, and now a parent-child privilege. She said that she had written to Congress stating that a piecemeal, patchwork approach to privileges would be a mistake. FED. R. EVID. 501 had worked well in practice, and if the Congress were to act at all, it should consider making a comprehensive review of all privileges.

Professor Capra noted that the advisory committee had completed a two-year project to notify the public that certain advisory committee notes to the Federal Rules of Evidence may be misleading. He stated that the report identified inaccuracies and inconsistencies created because several of the rules adopted by the Congress in 1975 differed materially from the version approved by the advisory committee. He stated that the committee's report would be printed by the Federal Judicial Center and would appear in Federal Rules Decisions.

ATTORNEY CONDUCT

Professor Coquillette summarized his May 18, 1998, Status Report on Proposed Rules Governing Attorney Conduct, set forth as Agenda Item 10. He recommended the appointment of an ad hoc committee to work on attorney conduct matters consisting of two members from each of the advisory committees, Chief Justice Veasey, Professor Hazard, and representatives from the Department of Justice.

He stated that the debate, essentially, had come down to two options. The first would be to have a single dynamic conformity rule that would eliminate all local rules and leave attorney conduct matters up to the states. The second would be to adopt a very narrow core of specific federal rules on attorney conduct. He said that there were serious differences of opinion on these options, and the ad hoc committee would seek to reach a consensus on the matter.

Professor Coquillette pointed out that misleading articles had appeared stating that the committee was proposing enactment of the 10 draft attorney conduct rules. He noted that the rules had been drafted only for internal debate and added that American Bar Association officials had been informed that the committee was not making any proposals at this point.

He stated that another misconception had been that the committee was proposing to increase the amount of federal rulemaking regarding attorney conduct. In fact, he said, the committee was trying to accomplish just the opposite. The thrust of the committee's discussions to date had been to reduce the number of local federal court rules and turn attorney conduct matters over generally to the states.

Finally, Professor Coquillette said that the study of attorney conduct would not be completed quickly. Time would be needed to coordinate efforts with the American Bar Association, the American Law Institute, and other bar groups. Time would also be needed to study attorney conduct issues in a bankruptcy context. Accordingly, the only action needed was for the Standing Committee to affirm the appointment of the ad hoc committee.

The committee voted without objection to appoint an ad hoc committee to study attorney conduct matters.

Professor Coquillette noted that the Court Administration and Case Management Committee had provided the committee with a set of principles to govern conduct in alternate dispute resolution proceedings. He said that no action was required on the part of the committee, but pointed out that there is likely to be more activity in this area at the local and national levels.

Professor Coquillette reported that two bills had been introduced in the Congress to govern attorney conduct. He said that the committee should respond to Congressional inquiries by referring to the ongoing attorney conduct project.

LOCAL RULES AND UNIFORM NUMBERING

Professor Squiers reported that about 70% of the district courts had renumbered their local rules, as required by the Judicial Conference. One member suggested that the circuit councils should be asked to assist the remaining courts in complying with the renumbering requirement.

Professor Squiers reported that the Civil Justice Reform Act of 1990 had expired and that many of the provisions contained in the district courts' individual civil justice expense and delay reduction plans had now been incorporated into local rules. The status and legality of other procedural requirements contained in local plans, however, was uncertain.

Judge Stotler praised the efforts of the Local Rules Project and pointed out that it had identified many good local rules that have now been adopted as national rules. She asked whether it would be helpful for the committee to commission a new national survey of local rules in light of the renumbering project, the 1993 amendments to the civil rules, and the expiration of the Civil Justice Reform Act. She suggested that Professor Squiers might consider preparing a specific proposal for committee consideration, including a provision for obtaining appropriate funding for a survey.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the Supreme Court had approved the restyled body of appellate rules with one minor amendment. He said that the restyling project had been successful because of the leadership shown by Judges Stotler and Logan and the hard work and expertise of Professor Mooney and Mr. Garner. Judge Stotler added that a great debt was also due to Judge Robert Keeton, who had initiated the project, and to Professor Charles Alan Wright, Judge George Pratt, and Judge James Parker.

Judge Parker said that the next project would be to restyle the body of criminal rules. He noted that a first draft had been prepared and would be considered by the Style Subcommittee. A final draft would likely be submitted to the Advisory Committee on Criminal Rules by December 1, 1998.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte referred to the docket sheet of technology issues set forth in the agenda book. He pointed out that electronic filing of court papers was the most significant technological development that would affect the federal rules. He noted that Mr. McCabe and his staff had prepared a paper summarizing the rules-related issues that had been raised in the 10 electronic filing pilot courts. He added that the paper would be circulated to the reporters and considered by the advisory committees.

PROPOSALS TO SHORTEN THE RULEMAKING PROCESS

Judge Stotler stated that the Executive Committee of the Judicial Conference had asked the committee to consider ways to reduce the length of the rulemaking process. Each of the advisory committees had discussed the matter and had concurred in principle that there should be some shortening of the process. No specific proposals, however, had been forwarded.

At Judge Stotler's request, Mr. Rabiej distributed and explained a chart setting forth the time requirements for the rules process and setting forth various ways in which the times might be reduced. He noted that some of the suggestions made for shortening the process are controversial. He proceeded to explain each of the proposed scenarios.

Mr. Rabiej stated that proposed amendments are normally presented to the Supreme Court following the September meeting of the Judicial Conference each year. He explained that, except in emergency situations, the Conference does not send proposals to the Court following the March Conference meetings because the justices do not have sufficient time to act on them before the May 1 period specified in the Rules Enabling Act.

One member questioned the need to shorten the process and asked the chair whether a policy decision had been made to shorten the process. She replied that no decision of the kind had been made, but that the Executive Committee had asked the rules committees to consider the issue. She added that the amount of time needed to consider a rule depends largely on the nature of the particular rule.

Another member suggested that it would be better to leave the existing, deliberative process in place, but to consider developing an emergency process that could be used to

address special circumstances requiring prompt committee action. Several other members concurred in this judgment and suggested the need to develop a fast track procedure.

Several members noted that the need for accelerated treatment of an amendment usually arises because the Congress or the Department of Justice decides to act on a matter through legislation. They observed that the Congress in several instances has decided not to wait for the orderly and deliberative promulgation of a rule because the process was seen as taking too long. The chair replied that the advisory committees might consider certifying a particular rule for fast track consideration.

One of the participants suggested that consideration be given to eliminating one or more of the six entities that participate in considering an amendment, *i.e.*, advisory committee, public, standing committee, Judicial Conference, Supreme Court, and Congress. Others responded, however, that each entity plays an important part in the process. Therefore, it would be unwise, both substantively and politically, to consider elimination of any of them. Members pointed to the important role played by the standing committee in assuring quality and consistency in the rules and that of the Supreme Court in giving the rules great prestige and credibility.

One member recommended that the committees adopt a fixed schedule for submitting proposed amendments to the rules as packages, such as once every five years. The advisory committees could stagger their changes so that civil rules, for example, might be considered in one year and criminal rules in the next. He advised the committee to accept the inevitability that: (1) emergencies will arise on occasion; and (2) the Congress or the Department of Justice will continue to press for action outside the Rules Enabling Act when they feel the political need to do so. He concluded, therefore, that the committees should establish a firm schedule for publishing and approving rules amendments in multi-year batches, but also take due account of emergencies, political initiatives, and statutory changes.

Judge Stotler suggested that further thought be given to the issue of shortening the length of the rulemaking process and that additional discussion take place at the next committee meeting. She also suggested that further thought be given to the issue of making the chairs of the advisory committees voting members of the Standing Committee.

NEXT COMMITTEE MEETINGS

The committee is scheduled to hold its next meeting on Thursday and Friday, January 7 and 8, 1999. Judge Stotler asked the members for suggestions as to a meeting place so that the staff could begin making reservations. She also asked the members to check their calendars and let the staff know their available dates for the June 1999 committee meeting.

Respectfully submitted,

Peter G. McCabe
Secretary