COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Washington, DC
June 17-18, 2004
Volume I

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 17-18, 2004

1. Opening Remarks of the Chair

   A. Report on the March 2004 Judicial Conference session
   B. Transmission of Supreme Court-approved rules amendments to Congress

2. **ACTION** — Approving Minutes of January 2004 Committee Meeting

3. Report of the Administrative Office

   A. Legislative Report
   B. Administrative Report

4. Report of the Federal Judicial Center

5. Report of the Advisory Committee on Evidence Rules

   A. **ACTION** — Approving publishing for public comment proposed amendments to Rules 404, 408, 606, and 609
   B. Minutes and other informational items

6. Report of the Advisory Committee on Appellate Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 4, 26, 27, 28, 32, 34, 35, 45, and new Rules 28.1 and 32.1
   B. Minutes and other informational items

7. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006 and Official Forms 6G, 16D, and 17
   B. **ACTION** — Approving publishing for public comment proposed amendments to Rules 1009, 2002, 4002, 7004, 9001, and Schedule I of Official Form 6
   C. Minutes and other informational items

8. Report of the Advisory Committee on Civil Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 6, 27, and 45 and Supplemental Rules B and C
   B. **ACTION** — Approving publishing for public comment at a later date proposed amendments to Rules 16, 26, 33, 34, 37, 45, 50, Supplemental Rules A, C, and E, and a new Supplemental Rule G, and revisions to Form 35
   C. **ACTION** — Approving publishing for public comment at a later date proposed amendments to restyled Rules 38-63, except Rule 45, which was acted on earlier
   D. **ACTION** — Approving publishing for public comment at a later date proposed noncontroversial style-substance amendments to Rules 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, and 40
   E. Consideration of proposed amendments to rules resolving noncontroversial "global" issues arising from style project
   F. Minutes and other informational items

9. Report of the Advisory Committee on Criminal Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59
   B. **ACTION** — Approving publishing for public comment proposed amendments to Rules 5, 32.1, 40, 41, and 58
   C. Minutes and other informational items

10. Report of Technology Subcommittee

11. Long-Range Planning Report

12. Next Meeting: January 10-11, 2005, or January 13-14, 2005

JUDICIAL CONFERENCE RULES COMMITTEES

May 18, 2004

Chairs

Honorable David F. Levi
Chief Judge, United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Honorable Samuel A. Alito, Jr.
United States Circuit Judge
357 United States Post Office
and Courthouse
50 Walnut Street
Newark, NJ 07101

Honorable A. Thomas Small
United States Bankruptcy Judge
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Honorable Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Honorable Edward E. Carnes
United States Circuit Judge
United States Court of Appeals
United States Courthouse, Suite 500D
One Church Street
Montgomery, AL 36104

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey U.S. Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Prof. Patrick J. Schiltz
University of St. Thomas
School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Prof. Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, OH 45469-2772

Prof. Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Prof. Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, NY 10023

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

(Standing Committee)

Chair:

Honorable David F. Levi
Chief Judge, United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Members:

Honorable Harris L Hartz
United States Circuit Judge
United States Court of Appeals
201 Third Street, N.W., Suite 1870
Albuquerque, NM 87102

Honorable J. Garvan Murtha
United States District Judge
United States District Court
204 Main Street
Brattleboro, VT 05301

Honorable Sidney A. Fitzwater
United States District Judge
United States District Court
1520 Earle Cabell Federal Building
and United States Courthouse
1100 Commerce Street
Dallas, TX 75242-1003

Honorable Thomas W. Thrash, Jr.
United States District Judge
United States District Court
2188 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361

Honorable Mark R. Kravitz
United States District Judge
United States District Court
Richard C. Lee United States Courthouse
141 Church Street
New Haven, CT 06510

Honorable Charles Talley Wells
Justice, Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1925

Dean Mary Kay Kane
University of California
Hastings College of Law
200 McAllister Street
San Francisco, CA 94102-4978

Patrick F. McCartan, Esquire
Jones Day
North Point, 901 Lakeside Avenue
Cleveland, OH 44114

Charles J. Cooper, Esquire
Cooper & Kirk, PLLC
1500 K Street, N.W., Suite 200
Washington, DC 20005

David M. Bernick, Esquire
Kirkland & Ellis LLP
200 East Randolph Drive, 59th Floor
Chicago, IL 60601

David J. Beck, Esquire
Beck, Redden & Secrest, L.L.P.
One Houston Center
1221 McKinney Street, Suite 4500
Houston, TX 77010

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (CONTD.)

Deputy Attorney General (ex officio)
Honorable James B. Comey
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 4111
Washington, DC 20530

Reporter:

Professor Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Advisors and Consultants:

Professor Geoffrey C. Hazard, Jr.
University of Pennsylvania Law School
139 Rutgers Avenue
Swarthmore, PA 19081

Professor R. Joseph Kimble
Thomas M. Cooley Law School
300 South Capitol Avenue
Lansing, MI 48933

Joseph F. Spaniol, Jr., Esquire
5602 Ontario Circle
Bethesda, MD 20816-2461

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON APPELLATE RULES

Chair:

Honorable Samuel A. Alito, Jr.
United States Circuit Judge
United States Court of Appeals
357 United States Post Office
and Courthouse
50 Walnut Street
Newark, NJ 07101

Members:

Honorable Carl E. Stewart
United States Circuit Judge
United States Court of Appeals
2299 United States Court House
300 Fannin Street
Shreveport, LA 71101-3074

Honorable John G. Roberts, Jr.
United States Circuit Judge
United States Court of Appeals
333 Constitution Avenue, N.W.
Washington, DC 20001

Honorable T.S. Ellis III
United States District Judge
United States District Court
Albert V. Bryan United States Courthouse
401 Courthouse Square
Alexandria, VA 22314-5799

Professor Carol Ann Mooney
Vice President and Associate Provost
University of Notre Dame
237 Hayes-Healy Center
Notre Dame, IN 46556

W. Thomas McGough, Jr., Esquire
Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219

Sanford Svetcov, Esquire
Lerach Coughlin Stoia & Robbins LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111

Mark I. Levy, Esquire
Kilpatrick Stockton LLP
607 14th Street, N.W., Suite 900
Washington, DC 20005-2018

Solicitor General (ex officio)
Honorable Theodore B. Olson
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 5143
Washington, DC 20530

Douglas Letter, Appellate Litigation Counsel
Civil Division, U.S. Department of Justice
601 D Street, N.W., Room 9106
Washington, DC 20530

Reporter:

Professor Patrick J. Schiltz
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Advisors and Consultants:

Marcia M. Waldron
Circuit Clerk
United States Court of Appeals
601 Market Street
Philadelphia, PA 19106

ADVISORY COMMITTEE ON APPELLATE RULES (CONTD.)

Liaison Member:

Honorable J. Garvan Murtha
United States District Judge
United States District Court
204 Main Street
Brattleboro, VT 05301

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair:

Honorable A. Thomas Small
United States Bankruptcy Judge
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Members:

Honorable R. Guy Cole, Jr.
Circuit Judge
United States Court of Appeals
127 Joseph P. Kinneary
United States Courthouse
85 Marconi Boulevard
Columbus, OH 43215

Honorable Ernest C. Torres
Chief Judge
United States District Court
United States Courthouse
One Exchange Terrace
Providence, RI 02903-1779

Honorable Irene M. Keeley
Chief Judge
United States District Court
500 West Pike Street, 2nd Floor
Clarksburg, WV 26301

Honorable Thomas S. Zilly
United States District Judge
United States District Court
410 United States Courthouse
1010 Fifth Avenue
Seattle, WA 48104-1130

Honorable Laura Taylor Swain
United States District Judge
United States District Court
Thurgood Marshall United States
Courthouse, Room 1205
40 Foley Square
New York, NY 10007

Honorable Richard A. Schell
United States District Judge
United States District Court
United States Courthouse Annex
Bank One Building
200 North Travis Street
Sherman, TX 75090

Honorable James D. Walker, Jr.
United States Bankruptcy Judge
United States Bankruptcy Court
433 Cherry Street
Macon, GA 31201-7957

Honorable Christopher M. Klein
United States Bankruptcy Judge
United States Bankruptcy Court
3-200 United States Courthouse
501 I Street
Sacramento, CA 95814-2322

Honorable Mark B. McFeeley
United States Bankruptcy Judge
United States Bankruptcy Court
421 Gold Street, S.W., 6th Floor
Albuquerque, NM 87102

Professor Mary Jo Wiggins
University of San Diego
School of Law
5998 Alcala Park
San Diego, CA 92110

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Professor Alan N. Resnick
Hofstra University School of Law
121 Hofstra University
Hempstead, NY 11549-1210

Eric L. Frank, Esquire
DiDonato & Winterhalter, P.C.
1818 Market Street, Suite 3520
Philadelphia, PA 19103

Howard L. Adelman, Esquire
Adelman, Gettleman, Merens, Berish
& Carter, Ltd.
Suite 1050, 53 West Jackson Boulevard
Chicago, IL 60604

K. John Shaffer, Esquire
Stutman, Treister & Glatt, P.C.
1901 Avenue of the Stars, 12th Floor
Los Angeles, CA 90067

Director, Commercial Litigation Branch,
Civil Division, U.S. Dept. of Justice (ex officio)
J. Christopher Kohn, Esquire
1100 L Street, N.W., 10th Floor, Room 10036
Washington, DC 20005

Reporter:

Professor Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, OH 45469-2772

Advisors and Consultants:

James J. Waldron
Clerk, United States Bankruptcy Court
Martin Luther King, Jr. Federal Building
and United States Courthouse
Third Floor, 50 Walnut Street
Newark, NJ 07102-3550

Lawrence A. Friedman
Director, Executive Office for
United States Trustees
20 Massachusetts Avenue, N.W., Suite 8000
Washington, DC 20530

Professor Bruce A. Markell
University of Nevada Las Vegas
William S. Boyd School of Law
4505 Maryland Parkway, Box 451003
Las Vegas, NV 89154-1003

Melissa B. Jacoby, Associate Professor
University of North Carolina School of Law
100 Ridge Road
Chapel Hill, NC 27599-3380

Patricia S. Ketchum, Esquire
1607 22nd Street, N.W.
Washington, DC 20008-1921

Liaison Member:

Honorable Harris L Hartz
United States Circuit Judge
United States Court of Appeals
201 Third Street, N.W., Suite 1870
Albuquerque, NM 87102

Liaison from Committee on the Administration of the Bankruptcy System:

Honorable Dennis Montali
United States Bankruptcy Judge
United States Bankruptcy Court
235 Pine Street
San Francisco, CA 94104

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON CIVIL RULES

Chair:

Honorable Lee H. Rosenthal
United States District Judge
United States District Court
11535 Bob Casey United States Courthouse
Houston, TX 77002

Members:

Honorable Paul J. Kelly, Jr.
United States Circuit Judge
United States Court of Appeals
120 South Federal Place
Santa Fe, NM 87501

Honorable Richard H. Kyle
United States District Judge
United States District Court
764 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, MN 55101

Honorable Shira Ann Scheindlin
United States District Judge
United States District Court
1050 United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Honorable Thomas B. Russell
United States District Judge
United States District Court
307 Federal Building
501 Broadway Street
Paducah, KY 42001

Honorable H. Brent McKnight
United States District Judge
United States District Court
168 Charles R. Jonas Federal Building
401 West Trade Street
Charlotte, NC 28202

Honorable C. Christopher Hagy
United States Magistrate Judge
United States District Court
1756 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
201 West 14th Street
Austin, TX 78701

Dean John C. Jeffries, Jr.
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903-1789

Professor Myles V. Lynk
Arizona State University College of Law
John S. Armstrong Hall
Orange/McAllister
Tempe, AZ 85287

Andrew M. Scherffius, Esquire
Scherffius, Ballard, Still & Ayres, L.L.P.
1201 Peachtree Street, N.E.
400 Colony Square, Suite 1018
Atlanta, GA 30361

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Robert C. Heim, Esquire
Dechert LLP
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA 19103-2793

Frank Cicero, Jr., Esquire
Kirkland & Ellis LLP
200 East Randolph Drive
Chicago, IL 60601

Assistant Attorney General
Civil Division (ex officio)
Honorable Peter D. Keisler
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Ted Hirt, Assistant Director
Federal Programs Branch
Civil Division
U.S. Department of Justice
20 Massachusetts Avenue, N.W.
Room 7106
Washington, DC 20530

Liaison Members:

Honorable Sidney A. Fitzwater
United States District Judge
United States District Court
1520 Earle Cabell Federal Building
and United States Courthouse
1100 Commerce Street
Dallas, TX 75242-1003

Honorable James D. Walker, Jr.
United States Bankruptcy Judge
United States Bankruptcy Court
433 Cherry Street
Macon, GA 31201-7957

Reporter:

Professor Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Advisors and Consultants:

Professor Richard L. Marcus
University of California
Hastings College of Law
200 McAllister Street
San Francisco, CA 94102-4978

Professor Thomas D. Rowe, Jr.
Duke University School of Law
Science Drive & Towerview Road
Box 90360
Durham, NC 27708-0360

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:

Honorable Edward E. Carnes
United States Circuit Judge
United States Court of Appeals
United States Courthouse, Suite 500D
One Church Street
Montgomery, AL 36104

Members:

Honorable Susan C. Bucklew
United States District Judge
United States District Court
109 United States Courthouse
611 North Florida Avenue
Tampa, FL 33602

Honorable Paul L. Friedman
United States District Judge
United States District Court
6321 E. Barrett Prettyman
United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001-2802

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

Honorable Harvey Bartle III
United States District Judge
United States District Court
16614 James A. Byrne United States
Courthouse
601 Market Street
Philadelphia, PA 19106-1714

Honorable James P. Jones
United States District Judge
United States District Court
180 West Main Street
Abingdon, VA 24210

Honorable Anthony J. Battaglia
United States Magistrate Judge
United States District Court
1145 Edward J. Schwartz United States
Courthouse
940 Front Street
San Diego, CA 92101-8927

Honorable Reta M. Strubhar
Judge
Court of Criminal Appeals of Oklahoma
State Capitol Building, Room 230
2300 North Lincoln Boulevard
Oklahoma City, OK 73105

Professor Nancy J. King
Vanderbilt University Law School
131 21st Avenue South, Room 248
Nashville, TN 37203-1181

Robert B. Fiske, Jr., Esquire
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017

Donald J. Goldberg, Esquire
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599

Lucien B. Campbell
Federal Public Defender
Western District of Texas
727 E. Durango Boulevard, B-207
San Antonio, TX 78206-1278

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

Assistant Attorney General
Criminal Division (ex officio)
Honorable Christopher A. Wray
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2107
Washington, DC 20530-0001

Deborah J. Rhodes
Counselor to Assistant Attorney General
Criminal Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Room 2218
Washington, DC 20530-0001

Reporter:

Professor David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Liaison Member:

Honorable Mark R. Kravitz
United States District Judge
United States District Court
Richard C. Lee United States Courthouse
141 Church Street
New Haven, CT 06510

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON EVIDENCE RULES

Chair:

Honorable Jerry E. Smith
United States Circuit Judge
United States Court of Appeals
12621 Bob Casey United States Courthouse
515 Rusk Avenue
Houston, TX 77002-2698

Members:

Honorable Ronald L. Buckwalter
United States District Judge
United States District Court
14614 James A. Byrne
United States Courthouse
601 Market Street
Philadelphia, PA 19106-1714

Honorable Robert L. Hinkle
United States District Judge
United States District Court
United States Courthouse
111 North Adams Street
Tallahassee, FL 32301-7717

Honorable Jeffrey L. Amestoy
Chief Justice, Vermont Supreme Court
109 State Street
Montpelier, VT 05609-0801

David S. Maring, Esquire
Maring Williams Law Office P.C.
400 E. Broadway, Suite 307
Bismarck, ND 58501

Patricia Lee Refo, Esquire
Snell & Wilmer L.L.P.
One Arizona Center
Phoenix, AZ 85004-2202

Thomas W. Hillier II
Federal Public Defender
Suite 1100
1111 Third Avenue
Seattle, WA 98101-3203

John S. Davis
Associate Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 4119
Washington, DC 20530

ADVISORY COMMITTEE ON EVIDENCE RULES (CONTD.)

Liaison Members:

Honorable Thomas W. Thrash, Jr.
United States District Judge
United States District Court
2188 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3361

Honorable Christopher M. Klein
United States Bankruptcy Judge
United States Bankruptcy Court
3-200 United States Courthouse
501 I Street
Sacramento, CA 95814-2322

Honorable Richard H. Kyle
United States District Judge
United States District Court
764 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, MN 55101

Honorable David G. Trager
United States District Judge
United States District Court
225 Cadman Plaza, East
Room 224
Brooklyn, NY 11201

Reporter:

Professor Daniel J. Capra
Fordham University School of Law
140 West 62nd Street
New York, NY 10023

Advisors and Consultants:

Honorable C. Arlen Beam
United States Court of Appeals
435 Robert V. Denney United States Courthouse
100 Centennial Mall North
Lincoln, NE 68508

Professor Leo H. Whinery
University of Oklahoma
College of Law
300 Timberdell Road
Norman, OK 73019

Professor Kenneth S. Broun
University of North Carolina
School of Law
CB #3380, Van Hecke-Wettach Hall
Chapel Hill, NC 27599

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

LIAISON MEMBERS

Appellate:

Judge J. Garvan Murtha (Standing Comm.)

Bankruptcy:

Judge Harris L Hartz (Standing Comm.)

Civil:

Judge Sidney A. Fitzwater (Standing Comm.)

Judge James D. Walker, Jr. (Bankruptcy Rules Comm.)

Criminal:

Judge Mark R. Kravitz (Standing Comm.)

Evidence:

Judge Thomas W. Thrash, Jr. (Standing Comm.)

Judge Christopher M. Klein (Bankruptcy Rules Comm.)

Judge Richard H. Kyle (Civil Rules Comm.)

Judge David G. Trager (Criminal Rules Comm.)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Staff:

John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

James N. Ishida
Attorney-Advisor
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

Judith W. Krivit
Administrative Specialist
Rules Committee Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

Anne Rustin
Secretary, Rules Committee
Support Office
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

Robert P. Deyling
Senior Attorney
Office of Judges Programs
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755

James H. Wannamaker III
Senior Attorney
Bankruptcy Judges Division
Administrative Office of the
United States Courts
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

SUBCOMMITTEES
May 2004

Subcommittee on Attorney Conduct
Professor Daniel R. Coquillette (Standing)
Judge Thomas W. Thrash, Jr. (Standing)
Charles J. Cooper, Esquire (Standing)
Judge Samuel A. Alito, Jr. (Appellate)
Professor Patrick J. Schiltz (Appellate)
Judge Ernest C. Torres (Bankruptcy)
Professor Jeffrey W. Morris (Bankruptcy)
(Open) (Civil)
Professor Myles V. Lynk (Civil)
Judge Paul L. Friedman (Criminal)
Robert B. Fiske, Jr., Esquire (Criminal)
Professor Daniel J. Capra (Evidence)
Judge Ewing Werlein (Federal/State liaison)
Judge John W. Lungstrum (CACM liaison)

Subcommittee on E-Government
Judge Sidney A. Fitzwater, Chair
Committee Reporters, Consultants
(Professor Daniel J. Capra, Lead Reporter)
Judge John G. Roberts, Jr. (Appellate)
Judge Laura Taylor Swain (Bankruptcy)
Judge Shira Ann Scheindlin (Civil)
Judge Reta M. Strubhar (Criminal)
Judge Robert L. Hinkle (Evidence)
Elizabeth Shapiro, Esquire (DOJ representative)
Judge David F. Levi *(ex officio)*
Professor Daniel R. Coquillette *(ex officio)*
Judge John W. Lungstrum (CACM *ex officio)*
Judge James B. Haines, Jr. (CACM liaison)
Judge John G. Koeltl (CACM liaison)

Subcommittee on Technology
Judge Sidney A. Fitzwater, Chair
Judge Thomas W. Thrash, Jr. (Standing)
Judge Mark R. Kravitz (Standing)
Sanford Svetcov, Esquire (Appellate)
Judge Thomas S. Zilly (Bankruptcy)
Professor Myles V. Lynk (Civil)
Judge Reta M. Strubhar (Criminal)
Committee Reporters, Consultants

Subcommittee on Style
Judge J. Garvan Murtha, Chair
Judge David F. Levi (*ex officio)*
Judge Thomas W. Thrash, Jr.
Dean Mary Kay Kane
Professor R. Joseph Kimble, Consultant
Joseph F. Spaniol, Jr., Esquire, Consultant

LIAISONS TO ADVISORY RULES COMMITTEES
Judge J. Garvan Murtha (Appellate)
Judge Harris L Hartz (Bankruptcy)
Judge Sidney A. Fitzwater (Civil)
Judge Mark R. Kravitz (Criminal)
Judge Thomas W. Thrash, Jr. (Evidence)

ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBCOMMITTEES

Subcommittee on Attorney Conduct and Health Care
Judge Ernest C. Torres, Chair
Judge Richard A. Schell
Judge Mark B. McFeeley
Howard L. Adelman, Esquire
K. John Shaffer, Esquire

Subcommittee on Business Issues
Professor Alan N. Resnick, Chair
Judge Thomas S. Zilly
Judge Christopher M. Klein
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire
James J. Waldron, *ex officio*

Subcommittee on Consumer Issues
Eric L. Frank, Esquire, Chair
Judge Laura Taylor Swain
Judge James D. Walker, Jr.
Professor Mary Jo Wiggins
James J. Waldron, *ex officio*

Subcommittee on Forms
Judge James D. Walker, Jr., Chair
Judge Christopher M. Klein
Professor Mary Jo Wiggins
Eric L. Frank, Esquire
J. Christopher Kohn, Esquire
James J. Waldron, *ex officio*
Patricia S. Ketchum, Esquire, Consultant

Subcommittee on Privacy, Public Access, and Appeals
Howard L. Adelman, Esquire, Chair
Judge Ernest C. Torres
Judge James D. Walker, Jr.
K. John Shaffer, Esquire

Subcommittee on Style
Professor Alan N. Resnick, Chair
Judge Christopher M. Klein
Professor Mary Jo Wiggins

Subcommittee on Technology and Cross Border Insolvency
Judge Thomas S. Zilly, Chair
Judge Irene M. Keeley
Judge Laura Taylor Swain
Judge Mark B. McFeeley

Subcommittee on Venue
K. John Shaffer, Esquire, Chair
Judge R. Guy Cole, Jr.
Judge Christopher M. Klein
Howard L. Adelman, Esquire

ADVISORY COMMITTEE ON CIVIL RULES

SUBCOMMITTEES

Subcommittee on Civil Forfeiture/ Settlement Sealing
Judge H. Brent McKnight, Chair
Judge Richard H. Kyle
Dean John C. Jeffries, Jr.
Robert C. Heim, Esquire
Professor Richard L. Marcus, Consultant

Subcommittee on Class Actions
Judge Richard H. Kyle, Chair
Judge Shira Ann Scheindlin
Andrew M. Scherffius, Esquire
Robert C. Heim, Esquire

Subcommittee on Discovery
Professor Myles V. Lynk, Chair
Judge Shira Ann Scheindlin
Judge C. Christopher Hagy
Justice Nathan L. Hecht
Andrew M. Scherffius, Esquire
Robert C. Heim, Esquire
Frank Cicero, Esquire
Professor Richard L. Marcus, Consultant

Subcommittee on Rule 15 and Rule 50
Judge Richard H. Kyle, Chair
Judge Shira Ann Scheindlin
Judge H. Brent McKnight
Judge C. Christopher Hagy
Frank Cicero, Esquire

Subcommittee on Style
Subcommittee A
Judge Thomas B. Russell, Chair
Judge H. Brent McKnight
Judge C. Christopher Hagy
Dean John C. Jeffries, Jr.
Andrew M. Scherffiius, Esquire
Frank Cicero, Esquire
Honorable Peter D. Keisler
Professor Thomas D. Rowe, Jr., Consultant

Subcommittee B
Judge Paul J. Kelly, Jr., Chair
Judge Shira Ann Scheindlin
Judge Richard H. Kyle
Justice Nathan L. Hecht
Professor Myles V. Lynk
Robert C. Heim, Esquire
Honorable Peter D. Keisler
Professor Richard L. Marcus, Consultant

ADVISORY COMMITTEE ON CRIMINAL RULES

SUBCOMMITTEES

Rule 41 Subcommittee
(Open), Chair
Judge Harvey Bartle III
Professor Nancy J. King
Lucien B. Campbell, Esquire
DOJ representative

Subcommittee on Grand Jury
Judge Susan C. Bucklew, Chair
Judge Paul L. Friedman
Robert B. Fiske, Jr., Esquire
Donald J. Goldberg, Esquire
DOJ representative

Subcommittee on Habeas Corpus
Judge David G. Trager, Chair
Professor Nancy J. King
Lucien B. Campbell, Esquire
DOJ representative

Subcommittee on Preliminary Proceedings
Judge Anthony J. Battaglia, Chair
Lucien B. Campbell, Esquire
DOJ representative

Subcommittee on Rule 16/Brady
Judge Susan C. Bucklew, Chair
Judge David G. Trager
Donald J. Goldberg, Esquire
Lucien B. Campbell, Esquire
DOJ representative

ADVISORY COMMITTEE ON EVIDENCE RULES

SUBCOMMITTEES

Subcommittee on Privileges
Professor Daniel J. Capra
Judge Jerry E. Smith, *ex officio*
Judge Ronald L. Buckwalter
David S. Maring, Esquire
Professor Kenneth S. Broun, Consultant

May 21, 2004
Projects

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

APR 26 2004

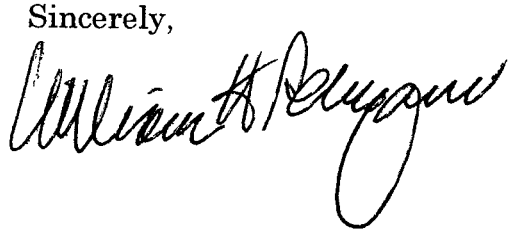
Honorable Dick Cheney
President, United States Senate
Washington, D.C. 20510

Dear Mr. President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

APR 26 2004

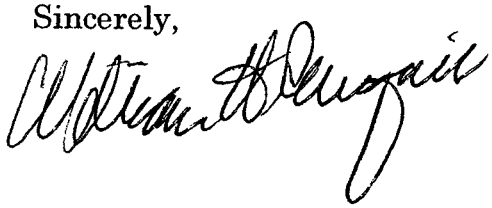
Honorable Dick Cheney
President, United States Senate
Washington, D.C. 20510

Dear Mr. President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure and the rules and forms governing cases in the United States district courts under Sections 2254 and 2255 of Title 28, United States Code, that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 23, 2004

Honorable Leonidas Ralph Mecham
Secretary
Judicial Conference of the United States
Washington, DC 20544

Dear Ralph:

The Court has reviewed the Judicial Conference's submission of the proposed amendments to the Federal Rules of Bankruptcy Procedure, the Federal Rules of Criminal Procedure, the Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts and accompanying forms, and the Federal Rules of Evidence. We have approved and forwarded the proposed amendments to Congress, with one exception.

We have withheld approval of the proposed amendment to Evidence Rule 804(b)(3), which would require "particularized guarantees of trustworthiness" indicating the reliability of an unavailable hearsay witness's statements against penal interest when offered by the Government in a criminal case to inculpate an accused. In *Crawford v. Washington*, No. 02-9410 (March 8, 2004), a decision rendered after the Conference's submission of the proposed amendment, the Court addressed the right to confrontation. We believe the Conference or its committee may wish to consider the proposed amendment in light of *Crawford*.

Sincerely,

William H. Rehnquist

20508

Meeting of January 15-16, 2004
Phoenix, Arizona
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 15-16, 2004. The following members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Assistant Attorney General Robert D. McCallum
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L. Hartz
Dean Mary Kay Kane
Judge Mark R. Kravitz
Patrick F. McCartan, Esquire
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee and assistant director of the Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; Robert P. Deyling, senior attorney in the Office of Judges Programs of the Administrative Office; Professor Stephen Gensler, Supreme Court Fellow at the Administrative Office; Brook D. Coleman, law clerk to Judge Levi; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., Professor R. Joseph Kimble, and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge John G. Roberts, Jr., Member
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were Professors William Henning, Deborah R. Hensler, Lance M. Liebman, and Bruce A. Markell, and attorneys Francis H. Fox, Patricia Lee Refo, and Robert S. Peck.

INTRODUCTORY REMARKS

Judge Levi announced that he was deeply honored to have been selected by the Chief Justice as the new chair of the Standing Committee. He mentioned that he had served on the Advisory Committee on Civil Rules for several years, and he emphasized the importance of having the chairs and reporters of the advisory committees participate in the meetings of the Standing Committee. He said that it is particularly helpful for them to hear first-hand the concerns of Standing Committee members. He added that the Standing Committee has a very good perspective on the overall rules process, and it gives

the advisory committees sound advice, alerts them to potential problems with proposed rules amendments, and improves the quality of proposed amendments and committee notes.

Judge Levi stated that the quality and competence of the members and reporters of the rules committees are truly exceptional, and there is every reason for the Judicial Conference and Congress to have confidence in the thoughtfulness of the deliberations and the eventual quality of rules amendments. He pointed out that the Standing Committee itself, rather than the individual advisory committees, had initiated several rules amendments — particularly with regard to issues cutting across advisory committee lines, such as the local rules project, restyling of the rules, and implementation of the E-Government Act.

He offered special praise for the Style Subcommittee (comprised of Judge Murtha, Judge Thrash, and Dean Kane) and its consultants and staff (Professor Kimble, Mr. Spaniol, and Mr. Deyling). He also expressed gratitude for the many contributions made by the Federal Judicial Center in providing the rules committees with important empirical research to aid their work.

Judge Levi noted that the Standing Committee at its last meeting had celebrated Judge Scirica's achievements as chair of the committee. To follow up at this time, he presented Judge Scirica with a framed resolution, signed by Chief Justice Rehnquist and Administrative Office Director Mecham, honoring the former chair for his distinguished service to the rules committees.

Judge Scirica reflected on his service with the committee. He noted at the outset that his primary concern as chair had been to maintain the productive relationships of the rules committees with Congress, the bar, and the public. He pointed out that the relationship with Congress is defined by the Rules Enabling Act, a contract that has worked exceptionally well over the years. He added that Congress had done the rules committees a favor by amending the Act to mandate that rules committee proceedings be open to the public. This, he said, had enabled the committees to receive and respond to a wide range of public criticism and to deal constructively with the political consequences of controversial rules amendments.

He said that the Rules Enabling Act had been proven to be a superior method for writing procedural law, and he added that he would be hard pressed to suggest improvements in the process. He noted that there will always be some tension between the judiciary and the legislature in rule making, but the Rules Enabling Act channels the tension into a constructive process. He added his wish that members of Congress take the opportunity to observe the rules process first hand and witness the great thought and care that goes into the work of the committees.

Judge Scirica pointed out that Congress had been very responsible in recent years in respecting the Rules Enabling Act and avoiding direct rulemaking by legislation. But, he added, 2003 had been a rough year for the judiciary because of strong Congressional activity in the sentencing area. In addition, Congress had amended the criminal rules directly by legislation as part of the war against terrorism. Although this sort of action raises concerns for maintaining the integrity of the Rules Enabling Act, he concluded that the good relationship with Congress in the area of rules will continue as long as the committees maintain the current level of confidence by producing sound rules and following sound process. He added that Deputy Attorney General Thompson and Assistant Attorney General McCallum had been particularly helpful in working with the committee on these matters.

Judge Scirica reported that the Supreme Court had been very supportive of the committee, and it normally approves proposed rules changes. During his time on the committee, he said, there had only been one instance in which the Court had declined to send a proposed rule to Congress. He explained that the committee chair does not personally discuss the merits of proposed rules with the Court, and he had never received a call from the Court as to the merits of any rules changes. Nevertheless, he added, the Court is provided with a precise summary of all proposed rules changes and a description of any controversies associated with the changes.

Judge Scirica said that the chair of the Standing Committee meets periodically with the Chief Justice to brief him generally on the ongoing work of the committee and to get feedback from him. The meetings, he said, are very cordial and helpful, and the Chief Justice is very interested in the committee's work. He added that all the members of the Court are very much aware of the committee's work.

Judge Scirica said that rules amendments forwarded to the Judicial Conference tend to fall into two broad categories. First, there are the proposed rules changes dealing with areas in which Conference members have little personal familiarity. As to those rules, the Conference generally defers to the experience and expertise of the rules committees.

On the other hand, there are the proposed rules changes dealing with issues and procedures with which all members of the Conference are intimately familiar, such as the discovery rules. He suggested that Conference members tend to react to rules proposals in these areas based on their direct personal experience as judges. They may have developed strong views that are difficult to change. Judge Scirica pointed to the recent amendments to the discovery rules and noted that the amendments had been controversial and had only won Conference approval on a close vote.

Judge Scirica reported that the Chief Justice had advised the committee to proceed with great caution in seeking amendments to the Federal Rules of Evidence and not to proceed with restyling the evidence rules.

Judge Scirica pointed to the important work of the Advisory Committee on Civil Rules in obtaining amendments to FED. R. CIV. P. 23. He noted that class actions give rise to many complex and controversial issues, and he praised Judges Higginbotham, Niemeyer, and Levi for carrying on a meaningful dialog with the bar on Rule 23 and mass torts. He added that the committee had convinced the Judicial Conference to withdraw its opposition to the concept of minimal-diversity legislation, and he suggested that Congress was likely to enact some form of minimal-diversity class action legislation in the coming year.

Judge Scirica noted that the committee was poised to proceed with attorney-conduct rules if it becomes necessary to promulgate them. He added that the committee had completed a great deal of work on proposed rules, but had put them aside until there is a consensus among the Department of Justice, the Conference of Chief Justices, and the American Bar Association to resolve controversial issues dealing with the extent to which state disciplinary rules govern the conduct of federal government attorneys.

Judge Scirica reported that the style project is enormously time-consuming, but it has been one of the most significant accomplishments of the rules committees. He pointed to the successful restyling of the appellate and criminal rules under the leadership of Judges Logan, Garwood, Davis, and Carnes and the support of Professor Schlueter and Mr. Rabiej. He said that it will be much more difficult to restyle the civil rules, but he noted that he had promised the Chief Justice that the job will be exceptionally well done. He added that the project is designed to improve the language and readability of the rules, while avoiding substantive changes in the rules. Nevertheless, he said, some changes in substance may be inevitable, but they should be minor in nature and clearly identified.

Judge Scirica thanked Mr. McCabe and Mr. Rabiej for their dedication and staff support, Professor Coquillette and the other reporters for their expertise and sound counsel, the Federal Judicial Center for its research support, and Professor Hazard for his wisdom and advice. Finally, he thanked Judge Levi as a close friend who will succeed him as chair of the Standing Committee after a distinguished term as chair of the Advisory Committee on Civil Rules.

Following Judge Scirica's remarks, Judge Rosenthal thanked Judge Levi for his deft touch, skill, and good humor and presented him with a resolution thanking him for his work as chair of the advisory committee from 2000 to 2003.

Professor Kimble reported that the Legal Writing Institute, the professional organization of legal writing teachers, had presented its Golden Pen Award to Judge Robert Keeton, former chair of the Standing Committee, for his vision in establishing the project to restyle the federal rules. He pointed out that the members of the current Style Subcommittee had attended the award ceremony for Judge Keeton in Atlanta.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 9-10, 2003.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that Senator Kohl had reintroduced the Sunshine in Litigation Act. Among other things, the bill would prevent a court from approving a settlement agreement that limits disclosure of the agreement unless the court specifically finds that the litigants' privacy interests in preventing disclosure of the agreement outweigh the public's interest in safety and public health. In response to the legislation, he said, the committee had asked the Federal Judicial Center to conduct a study of sealed settlements in the federal courts. He said that the study was not yet complete, but the survey results to date had confirmed that most settlement agreements are neither filed with the court nor require court approval. Center researchers, he explained, had examined 130,000 federal civil cases and had found only 379 cases with sealed settlements.

He said that Professor Steven Gensler, the Administrative Office's Supreme Court Fellow, had reviewed all 379 cases and had concluded that the complaints filed in these cases contain sufficient information to notify the public of any potential public health and safety problems, even though the settlement documents themselves are sealed. Mr. Rabiej reported that a letter had been sent to Senator Kohl informing him of these preliminary findings and promising him an additional response when the Federal Judicial Center study has been completed.

Mr. Rabiej reported that the E-Government Act of 2002 requires the judiciary to promulgate rules under the Rules Enabling Act to protect privacy and security interests when documents are filed with the court electronically.

He reported that the committee and staff had spent a great deal of time on the proposed Class Action Fairness Act. Among other things, the bill would give the federal courts "minimal-diversity" jurisdiction over certain class actions involving plaintiffs from

different states. The House of Representatives had passed its version of the legislation in June 2003 (H.R. 1115, 108th Cong., 1st Sess.), and the Senate was in the process of considering a slightly different version (S. 2062, 108th Cong., 2nd Sess.). He stated that the legislation was very controversial, but it appears that a political compromise had been reached in the Senate on the jurisdictional provisions. He added that the legislation was now likely to pass the Senate, but differences between the House and Senate versions would still have to be worked out.

Mr. Rabiej reported that the committee had persuaded the Senate to eliminate a "plain-English" settlement notice provision in the legislation because it was inconsistent with the December 2003 amendments to FED. R. CIV. P. 23. On the other hand, the legislation still contained an objectionable provision requiring the consent of the plaintiffs before the Judicial Panel on Multidistrict Litigation can allow a case removed into a federal court to be transferred to a different court.

Mr. Rabiej stated that there had been a last-minute attempt by credit-reporting agencies to delay the effective date of the bankruptcy-rule amendments that took effect on December 1, 2003. The amendments were designed to protect the privacy interests of debtors by requiring that only the last four digits of their social security numbers be disclosed. He added that a House of Representatives subcommittee was planning to hold hearings in April 2004 to explore whether the amendments have caused any problems for the credit-reporting industry.

Mr. Rabiej reported that the proposed Bail Bond Fairness Act of 2003 would amend FED. R. CRIM. P. 46 to prohibit a judge from forfeiting a bail bond for any reason other than the defendant's failure to appear before the court as ordered. He said that the House Judiciary Committee had reported out the bill despite opposition from the judiciary and the Department of Justice. He noted that Judge Carnes had testified against the legislation, and Congress had been informed that a national survey of all magistrate judges had shown their strong opposition to the legislation. In addition, Congress had been informed that an examination by ten probation offices of their records had demonstrated that out of 50,000 federal cases reviewed, there had been only 20 in which a bail bond had been forfeited. Judge Carnes added that the legislation was likely to face greater opposition in the Senate Judiciary Committee.

Administrative Report

Mr. McCabe reported that he had reassigned additional staff resources from the Office of Judges Programs to support the work of the rules committees. He thanked the committee for supporting his funding request to upgrade the rules office's electronic document management system to the latest version of the commercial Documentum software. In light of the severe funding crisis facing the judiciary, he said, the

committee's support was crucial, and it appears that money will be provided to upgrade the record-keeping system.

Mr. McCabe also reported that the Statistics Division of the Administrative Office had been transferred into the Office of Judges Programs. He suggested that having the statistics operation and the rules office under the same leadership should open up opportunities to provide better empirical information to assist in the work of the rules committees.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported that the agenda book for the committee meeting contained a status report on the educational and research projects of the Federal Judicial Center. (Agenda Item 4) He highlighted three important Center projects: (1) the impending publication of the Fourth Edition of the Manual for Complex Litigation; (2) the development of new case weights for the district courts; and (3) the various efforts underway to support the work of the Advisory Committee on Civil Rules in considering possible amendments to the civil rules to address discovery of electronic documents.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Roberts and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachments of December 2, 2003. (Agenda Item 5) Professor Schiltz reported that the advisory committee had no action items to present.

Information Items

Amendments to be Presented to the Standing Committee in June 2004

Professor Schiltz pointed out that the committee had approved two items at its last meeting for presentation at the June 2004 meeting of the Standing Committee.

The first is a proposed amendment to FED. R. APP. P. 26(c) that would clarify the means of calculating the three extra days given a party to respond if service has been made by mail, leaving it with the clerk of court, by electronic means, or by other means consented to by the party served. The proposed rule, he said, is substantively the same as the pending amendment to FED. R. CIV. P. 6(e), published in August 2003. He pointed out that the wording of the two provisions is somewhat different, but the appellate rules committee would work with the civil rules committee to harmonize the language.

Professor Schiltz stated that the second provision approved by the advisory committee would amend FED. R. APP. P. 7 to resolve a split among the circuits over whether attorney fees are included among the "costs on appeal" that may be secured by a bond. The proposed amendment would specify that attorney fees are not included.

Amendments Published for Comment in August 2003

Professor Schiltz noted that two of the rules published for public comment in August 2003 were controversial.

FED. R. APP. P. 35

The first controversial provision, he said, deals with en banc voting. Both the governing statute, 28 U.S.C. § 46(c), and FED. R. APP. P. 35(a) provide that a court may hear or rehear a matter en banc by the vote of "a majority of the circuit judges who are in active service." But, he said, there are three different circuit court interpretations of the statute and rule: (1) the "absolute majority" approach, under which there must be an affirmative vote by an absolute majority of all judges on the court (and disqualified judges are counted in the base in determining whether there is a majority); (2) the "case majority" approach, under which there must be a majority of the non-disqualified judges of the court; and (3) the "qualified case majority" approach, under which disqualified judges do not count in the base, but a majority of all judges of the court — disqualified or not — must be eligible to participate in the case.

Professor Schiltz reported that members of the advisory committee had differing views as to the merits of the competing approaches. But, he said, the committee was unanimous in its view that Rule 35 should be amended so that all circuits treat disqualified judges in the same manner under the governing statute and rule. Judge Roberts added that there is no justification for local variations in this area.

FED. R. APP. P. 32.1

The second controversial provision — proposed new Rule 32.1 — would require appellate courts to permit attorneys to cite "unpublished" opinions. Professor Schiltz emphasized that the proposed rule is very limited in scope. It is, he said, only a citation rule, saying nothing about the precedential or binding effect of unpublished opinions or whether there should be unpublished opinions. He pointed out that the rule had attracted a good deal of comment in the legal press, and a letter-writing campaign had been launched against the rule, with the vast majority of comments coming from the 9th Circuit. On the other hand, he noted, there is considerable support and encouragement for the rule from bar groups.

Judge Roberts suggested that much of the opposition to the proposed new Rule 32.1 appears to be based on the fear of a "slippery slope," *i.e.,* that even though the proposed rule does not address the precedential effect of unpublished opinions, the rule inexorably would lead to courts recognizing unpublished opinions as precedent. The proposed rule, however, is very narrow.

Several participants spoke in favor of the proposed new rule and suggested that the traditional distinction between "published" and "unpublished" opinions is no longer meaningful. They argued that the central issue is whether a particular panel opinion will be binding on the entire circuit — since it is the rule of every circuit that a court of appeals can reverse itself only by acting en banc.

There was a clear consensus among the participants that unpublished opinions are very useful and that the committee should take no position on whether unpublished opinions should be given precedent. Several participants argued that many cases do not break new ground or raise serious legal issues. They simply do not merit the attention of a careful, precedential opinion. In fact, they said, the courts of appeals could not function effectively if they were bound by unpublished or non-precedential opinions. The proposed rule, they said, merely permits attorneys to cite these opinions for whatever weight they are worth.

One member cautioned, however, that allowing attorneys to cite unpublished opinions could increase the burdens on lawyers in light of their professional responsibilities to be aware of the decisions of the court and to represent their clients vigorously.

Longer-Range Matters

Professor Schiltz said that the advisory committee also had three longer-term projects on its agenda. The first would address the continuing problem of determining whether an appeal from a particular order involving a hybrid "criminal-civil" matter is an "appeal in a civil case," governed by the deadlines of FED. R. APP. P. 4(a), or an "appeal in a criminal case," governed by the deadlines of FED. R. APP. P. 4(b). He stated that the committee was considering the possibility of amending FED. R. APP. P. 4 to provide a global solution, such as a provision stating that all appeals are to be considered civil appeals, except for direct appeals from criminal convictions — and possibly a few other narrow categories of appeals. One of the participants added that consideration should be given to a provision that "substantial compliance" with either Rule 4(a) or Rule 4(b) should be sufficient, rather than having an inflexible, jurisdictional rule.

The second long-range project being considered by the advisory committee is to explore plugging some gaps in the appellate rules. Professor Schiltz noted, by way of

example, that there is no provision in the rules defining who are the parties to an appeal. He suggested that it is not always clear who the parties are, and some practical problems have arisen that might need to be addressed. He said that the Department of Justice had asked the committee to amend the rules, but there was disagreement on the committee as to the need for an amendment.

As for the third long-range project, Professor Schiltz noted that attorneys continue to complain about local rule variations, particularly with regard to the different local requirements of the circuits regarding briefs. Before proceeding any further, he said, the advisory committee had asked the Federal Judicial Center to report on how many variations are in existence, the history of the variances, and the degree to which the variances are enforced in practice.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of December 15, 2003. (Agenda Item 6).

Amendments for Publication

Judge Small reported that the advisory committee was seeking authority to publish amendments to two rules.

FED. R. BANKR. P. 5005(c)

Judge Small said that the advisory committee was proposing two minor changes in Rule 5005(c), dealing with errors in filing or transmitting papers. The rule currently provides that if a paper is intended to be filed with the clerk of the bankruptcy court but is mistakenly delivered to the U.S. trustee or several other named officials, it should be transmitted forthwith to the bankruptcy clerk. He pointed out that when the rule was written, the bankruptcy appellate panels had not yet become a national program. Therefore, one of the proposed amendments would add the clerk of the bankruptcy appellate panel to the list of officials named in the rule.

The current rule also provides if a paper is intended to be delivered to the U.S. trustee but is mistakenly sent to the clerk or several other officials, it should be transmitted forthwith to the U.S. trustee. The second proposed amendment would add the clerk of the bankruptcy appellate panel and a district judge to the list of persons who can transmit erroneously filed papers to the U.S. trustee.

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

FED. R. BANKR. P. 9036

Judge Small explained that Rule 9036 (notice by electronic transmission) provides that when a clerk of court, or some other person as directed by court, is required to send notice by mail, the intended recipient can ask that the notice be sent electronically. The rule states that the electronic notice is complete when the recipient receives electronic confirmation that it has been received.

Judge Small pointed out that many internet service providers do not provide an electronic confirmation. This problem prevents potential notice recipients from taking advantage of the rule. The proposed amendment states that electronic notice is complete upon transmission. It would make the rule consistent with FED. R. CIV. P. 5(b)(2)(B) and (D), which specify that service by mail is complete upon mailing, and service by electronic means is complete upon transmission.

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

Informational Items

Judge Small reported that there had been no comments to date on the proposed bankruptcy rule amendments published in August 2003, and the scheduled hearing had been canceled. He said that the advisory committee would present final recommendations on these amendments at the next Standing Committee meeting.

He said that the advisory committee would seek authority at the next meeting to publish additional proposed amendments. Amendments under consideration, he noted, include a controversial proposal by the Executive Office for U.S. Trustees that would require debtors to bring various financial documents to the first meeting of creditors. Another proposal from the U.S. trustees' office would require lawyers for debtors to disclose all attorney fees paid to them by the debtor during the year preceding the filing of the petition. He added that the committee had received many negative comments on the proposals from consumer bankruptcy lawyers, and the advisory committee had appointed a subcommittee to consider the proposal.

Judge Small said that the advisory committee would follow the lead of the civil advisory committee in implementing the E-Government Act of 2002. He noted that the bankruptcy advisory committee had already implemented the Judicial Conference's privacy policy with rule amendments that took effect on December 1, 2003. He also

thanked the Administrative Office for its efforts in averting the attempts to have Congress delay the amendments.

Judge Small also pointed out that if the pending bankruptcy reform legislation were enacted, the advisory committee would be prepared to proceed with interim rules.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set forth in Judge Rosenthal's memorandum and attachments of December 16, 2003. (Agenda Item 7)

Amendments for Publication

FED. R. CIV. P. 16-37 and 45

Judge Rosenthal reported that the Standing Committee had approved publication of the proposed restyling of FED. R. CIV. P. 1-15 at its June 2003 meeting. She said that the advisory committee was now recommending that restyled FED. R. CIV. P 16-37 and 45 be approved for publication in the same package. She added that the advisory committee would return at the next Standing Committee meeting to seek authority to publish additional rules as part of the restyling project.

She explained that the advisory committee had intended to publish the rules in two successive packages in August 2004 and August 2005. But, she said, the restyling process had proceeded so successfully that the advisory committee had reconsidered its plans and was now proposing to publish all the restyled rules in a single package — either in the spring or summer of 2005 — with an expanded public comment period. She noted that a single package would be less confusing for the bench, bar, and public. A 2005 publication date, moreover, would also give the committee additional time to work on rules containing changes that might be considered as more than pure style.

Judge Rosenthal explained that the committee had identified a number of rules in which a proposed change in the current language might alter the meaning and be considered a substantive change. Nevertheless, she said, the change would not be controversial, and it would improve the rule. She suggested that the committee could be subject to legitimate criticism if it failed to make such minor, beneficial improvements as part of the restyling project. But, she added, any potential substantive changes must be clearly labeled as such, and the number of "style-plus" changes must be very limited.

Judge Rosenthal said that the committee had also identified a larger list of more substantive improvements that it would place on its future "reform agenda." These proposed changes would be completely divorced from the style project and would be subject to more intensive analysis. She pointed out, by way of example, that the advisory committee would not propose major changes in Rule 56 as part of the restyling project, but it would consider the rule in depth in the future. She also noted that the advisory committee had, for the most part, retained ambiguities in the current rules, leaving resolution of the ambiguities to the reform agenda.

Judge Rosenthal reported that the procedures being followed by the advisory committee had been borrowed in large measure from those used by the Advisory Committee on Criminal Rules in restyling the criminal rules. She explained that the work begins with a first draft of restyled rules prepared by the Standing Committee's style consultants. Their draft is reviewed by Professors Cooper, Marcus, and Rowe, whose views and comments are captured by Administrative Office staff in an extensive set of footnotes. The style consultants then review the comments of the professors and revise the draft for submission to the Standing Committee's Style Subcommittee. That subcommittee reviews the annotated document in depth and approves a draft for consideration by the Advisory Committee on Civil Rules.

Judge Rosenthal continued that the advisory committee had divided itself into two ad hoc subcommittees, chaired by Judges Russell and Kelly, each of which reviews half the rules. Each subcommittee member takes the lead in analyzing and commenting on a designated number of rules for the subcommittee. The rules are then reviewed and approved by the subcommittee and then by the full advisory committee.

Judge Rosenthal explained that the number of footnotes gets smaller and smaller through the process, as individual concerns are addressed, researched, and analyzed, and decisions are made. Thus, she said, the final, "clean" product presented to the Standing Committee simply does not reflect the enormous amount of work by all concerned and the depth of their analysis.

Judge Rosenthal reported that the advisory committee must also address a list of "global issues." Essentially, these issues concern terms used over and over in the rules, but not in a consistent manner. Conversely, different terms are used interchangeably throughout the rules when no apparent difference in meaning is intended. In addition, she said, the rules are replete with redundancies and needless adjectives, some of which appear to have been inserted deliberately. The advisory committee, she said, was also attempting to make the usage consistent throughout the rules, but it was struggling to avoid making substantive changes as part of the style project.

Professor Cooper reported that the advisory committee had included a standard two-sentence disclaimer in the committee note to each rule declaring that the proposed changes in the language of the rule were intended to be stylistic only. He noted that additional explanation had been included in each committee note whenever a change in language might possibly be interpreted as being something more than pure style. He recited a number of examples from the proposed committee notes explaining that changes were being proposed to correct an obvious drafting oversight, eliminate a gap, avoid uncertainty, eliminate a redundancy, achieve consistency with the language of related rules, or reflect current widespread practice.

Professor Capra suggested that there were certain overlaps and inconsistencies between the civil rules and the evidence rules that needed to be addressed. The civil rules, he noted, retained some evidence remnants left over from the days before the Federal Rules of Evidence came into existence in the 1970s.

Judge Levi suggested that a few of these problems might be resolved quickly and incorporated in the draft of the restyled rules published for public comment. But, he said, other interfaces between the civil and evidence rules were more complicated and substantive. He asked the Advisory Committee on Evidence Rules to review the restyled civil rules very carefully during the public comment period and submit written recommendations to the civil advisory committee. He also asked the Advisory Committee on Bankruptcy Rules to review and submit comments on the rules.

The committee approved publication of restyled Rules 16-37 and Rule 45 by voice vote without objection, subject to the advisory committee presenting additional changes in these rules at the June 2004 meeting.

Informational Items

Rules Published in August 2003

Judge Rosenthal reported that the advisory committee in August 2003 had published proposed amendments to Rules 6, 24, 27, 45 and a proposed new Rule 5.1. She explained that the rules were relatively noncontroversial, and the public hearing had been canceled.

Electronic Discovery

Judge Rosenthal reported that the advisory committee's project to consider rules amendments to deal specifically with the discovery of computer-based information was proceeding very successfully. She noted that the committee would convene a major conference in February 2004 with judges, lawyers, law professors, and computer experts

at Fordham Law School in New York, hosted by Professor Capra. She said that the time had come to consider publishing a package of potential amendments to the discovery rules in light of a newly developing body of case law on electronic discovery, increasing calls from many members of the bar for greater clarification of their responsibilities regarding electronic discovery, and the emergence of standards in this area by bar groups, state courts, and local rules.

She noted that the advisory committee was proceeding very cautiously and was focusing its attention on two threshold questions: (1) whether the existing civil rules are adequate to deal with the problems posed by electronic discovery, and (2) if any rules amendments are needed, what form they should take. She noted that the attendance list for the New York conference included a good balance of practitioners from a wide variety of law practices. In addition, she noted, judges had been invited from federal and state courts having rules in place governing electronic discovery. She said that the conference would be constructed around a series of focused panel discussions addressing such topics as defining what is electronic discovery, addressing electronic discovery issues early in discovery planning under Rules 16 and 26, specifying the form of production of electronic information, defining a party's duty to preserve electronic discovery materials, and protecting against inadvertent privilege waiver.

Civil Asset Forfeiture Provisions

Judge Rosenthal explained that many statutes specify that the supplemental admiralty rules govern civil asset forfeiture proceedings. But the provisions applicable in civil asset forfeiture proceedings are scattered throughout the admiralty rules. Moreover, forfeiture practice presents a number of issues that do not arise in admiralty proceedings.

At the Department of Justice's request, she said, the advisory committee had been working for some time on drafting a new Rule G that would bring together in one place all the present forfeiture provisions of the admiralty rules and add some desirable new provisions. The committee, she noted, had consulted in depth on the proposed Rule G with both the Department of Justice and representatives of the National Association of Criminal Defense Lawyers. She added that the Department had wanted the committee to include in the new rule a provision addressing the issue of the standing required to file a claim, but the committee had decided that the issue was one of substance, rather than procedure.

Sealed Settlements

Judge Rosenthal said that the advisory committee was awaiting a final report from the Federal Judicial Center before deciding whether to consider a possible rule dealing with sealed settlements.

Class Action Legislation

Judge Rosenthal reported that the controversial Class Action Fairness Act might be enacted during the current session of Congress. The legislation, she noted, contained complicated "minimal-diversity" provisions giving the federal courts jurisdiction over many multi-state class actions. She said that a compromise version of the legislation appeared to have been worked out in the Senate, but there were still a number of differences between the Senate and House bills.

She noted, among other things, that the Senate version of the legislation (S. 2062) contained a provision giving a court of appeals discretion to take an appeal from a district court's order remanding a class action. But, she said, once the court of appeals accepts the appeal, it must render a decision within 60 days after the appeal is filed. Several participants argued that the provision was unworkable and should be opposed.

Judge Rosenthal noted that the advisory committee had worked hard on proposed amendments to FED. R. CIV. P. 23, including a provision that would authorize a court to certify a class for settlement purposes only. But, she said, the proposal had been deferred to await the outcome of Supreme Court's decisions in the *Amchem* and *Ortiz* cases. She added that if the pending class-action legislation were not enacted, the advisory committee would likely reconsider the earlier proposals.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes's memorandum and attachments of December 8, 2003. (Agenda Item 8)

Judge Carnes reported that the public hearing on the rules published for comment in August 2003 had been canceled. He added that the advisory committee had two controversial items on its agenda:

First, the Department of Justice had proposed that FED. R. CRIM. P. 29 be amended to require that a district judge defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. He said that the Department had claimed that some pre-verdict Rule 29 rulings were wrong, but the Department could not appeal the rulings because the Constitution's Double Jeopardy Clause rendered them unappealable. Judge Carnes reported that the advisory committee had voted 7-4 to proceed with further consideration of amending Rule 29, but several committee members had expressed concerns about the effect of an amendment in cases involving multi-count indictments and deadlocked juries.

Second, the American College of Trial Lawyers had proposed amendments to FED. R. CRIM. P. 11 and 16 that would, in effect, supersede the Supreme Court's 2002 decision in *United States v. Ruiz,* involving application of the rule in *Brady v. Maryland* to guilty pleas. He added, though, that it would be unusual for the committee to propose an amendment to the Supreme Court that would overrule one of the Court's decisions so soon after it has been issued.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of December 1, 2003. (Agenda Item 9)

Judge Smith reported that the advisory committee had no action items to present. But, he said, the committee had given tentative approval to five rule amendments that it would present to the Standing Committee in June 2004 seeking authority to publish. The proposals include amendments to: (1) FED. R. EVID. 404(a) to clarify that character evidence is never admissible to prove conduct in a civil case; (2) FED. R. EVID. 408 to limit the admissibility of evidence of compromise; (3) FED. R. EVID. 410 to protect statements and offers made by prosecutors during guilty plea negotiations to the same extent that the rule currently protects statements and offers made by defendants and their counsel; (4) FED. R. EVID. 606(b) to limit evidence about jury deliberations to the narrow issue of whether there has been a clerical mistake in reporting the verdict; and (5) FED. R. EVID. 609(a)(2) to limit automatic impeachment of a witness's character for truthfulness to convictions involving those crimes that contain a statutory element of "dishonesty or false statement." Professor Capra added that all these proposed amendments had been derived from the advisory committee's project to review conflicts in the case law interpreting the Federal Rules of Evidence.

Judge Smith added that the advisory committee was continuing to study other evidence rules for possible amendments. The committee was also continuing its study of the federal common law of privileges. He emphasized, however, that the committee would not propose amendments to the evidence rules regarding privileges.

LOCAL RULES PROJECT

Professor Coquillette noted that Congress had been concerned for many years over the number and content of local court rules. The 1988 amendments to the Rules Enabling Act, he said, had entrusted the judiciary with responsibility for monitoring local rules and abrogating those that are inappropriate. He said that the committee had accomplished a

great deal in carrying out this responsibility. Among other things, it had conducted comprehensive studies of the local rules of both the appellate and district courts. It had also amended the federal rules to require that local rules conform to the numbering system of the national rules and that they not duplicate legislation or the national rules.

Professor Coquillette reported that a principal goal of the Local Rules Project was to inform district courts of local rules that may violate the specific requirements of the Rules Enabling Act and FED. R. CIV. P. 83 that such rules be "consistent with," and not be "duplicative of," national law. He said that Professor Capra had carefully reviewed the comprehensive report of Professor Mary Squiers, examining each rule that she had identified as problematic, and he had winnowed down her report considerably. The revised report, he explained, had been approved by the ad hoc Subcommittee on Local Rules, comprised of Judge Fitzwater (chair) and Professors Coquillette and Capra. Accordingly, letters could now be sent to the courts advising them as to the committee's conclusions regarding their local rules.

Professor Capra noted that the revised report had been recast as a report from the Subcommittee on Local Rules to the Standing Committee. He explained that the report identified any local court rules directly in conflict with a national rule or statute. It also listed rules that "arguably conflict" with, or contain "arguably problematic duplication" of, a national rule or statute. But, he added, the report did not address conflicts between local rules and case law, since these lie outside the scope of Rule 83.

Professor Capra said that the subcommittee would make a final check to make sure that all the local rules in the study are up to date, and it would make appropriate stylistic changes in the report and address it directly to the district courts. Individualized cover letters would be sent to each court, including courts that do not have any conflicting rules. Finally, he added, the letters would contain a disclaimer cautioning that the national study had not in fact addressed every rule. He explained, by way of example, that the study had not researched local rules implementing FED. R. CIV. P. 19 or 23.

The committee approved sending the local rules report and appropriate cover letters to the district courts.

IMPLEMENTING THE E-GOVERNMENT ACT

Judge Fitzwater reported that section 205(c) of the E-Government Act of 2002 requires the Supreme Court to promulgate rules under the Rules Enabling Act to protect privacy and security concerns relating to electronic filing of court documents and the availability of court documents filed electronically. The rules, he said, must provide

uniform treatment of privacy and security concerns throughout the federal courts. They must also take into consideration the best privacy and security practices both in the federal and state courts and must permit parties to file unredacted documents with the court under seal.

Judge Fitzwater explained that Judge Levi had appointed a special subcommittee, including representatives from the Court Administration and Case Management Committee and observers from the Criminal Law Committee and Information Technology Committee, to begin work on drafting the required new federal rules. The advisory committee reporters would also serve on the subcommittee, with Professor Capra taking the staffing lead.

Judge Fitzwater added that the subcommittee had met the day before the Standing Committee meeting and had agreed that Professor Capra would draft a template rule, which he would circulate to the reporters of the other advisory committees. They, in turn, would tailor the template to fit the requirements of their respective rules. Thus, through the regular advisory committee process, each committee would consider proposed rule amendments at their next two meetings and present proposed rule amendments for publication at the June 2005 meeting of the Standing Committee.

Professor Capra explained that the template would be based on the model local rule drafted by the Court Administration and Case Management Committee and approved by the Judicial Conference. The model rule, he noted, requires that certain personal identifiers be deleted from papers filed with the court. It also contains a good deal of hortatory advice to attorneys cautioning them not to include objectionable materials and identifiers in their case filings. The subcommittee, however, had agreed that such cautions should be placed in committee notes, rather than a proposed federal rule.

ATTORNEY CONDUCT

Professor Coquillette reported that the committee's extensive efforts in considering potential attorney conduct rules have been placed on indefinite hold. He noted, however, that the committee would be ready to respond quickly if Congress were to enact legislation calling for the judiciary to initiate attorney conduct rules and if the Department of Justice, the Conference of Chief Justices, and the American Bar Association were to agree on the substance of the proposed rules.

PANEL DISCUSSION ON LAW REFORM

Professor Hazard, a former member of the Standing Committee, had been asked by Judge Levi to moderate a panel discussion with distinguished representatives of leading organizations engaged in law-reform efforts and conducting empirical studies on the work of the courts. Professor Hazard explained that the rules committees themselves had been deeply involved for several years in law-reform projects in such cutting-edge areas of the law as class actions, mass torts, and civil discovery. In pursuing these reforms, he said, the committees had relied on a number of empirical studies, and they had regularly solicited the views of the bar and interested organizations. He added that it would be very beneficial for committee members to learn more about the work of other organizations engaged in law-reform work, particularly their current and future projects.

The panelists described briefly the work of their respective organizations and responded to questions. Speaking in turn were:

1. Professor Deborah R. Hensler
2. Professor William Henning
3. Robert S. Peck, Esquire
4. Professor Bruce A. Markell
5. Patricia Lee Refo, Esquire
6. Professor Lance M. Liebman
7. Francis H. Fox, Esquire

1. Professor Hensler

Professor Hensler of Stanford Law School described some of her more significant projects, both in her present academic capacity at Stanford and as former director of RAND's Institute for Civil Justice.

She emphasized the importance of research on asbestos litigation, noting that RAND had been studying the area since the 1980s and would soon issue a final report on its pending asbestos project. She pointed out that two important areas of inquiry had been deferred in light of the pending negotiations regarding enactment of comprehensive asbestos legislation in Congress: (1) a study of actual recoveries by plaintiffs in asbestos litigation over the past 30 years; and (2) a review of the policy options on asbestos litigation from a public policy perspective. In response to questions, she responded that transaction costs have changed over the years, and the only efficient means of delivering asbestos relief to victims today is in the bankruptcy courts, where the transaction costs are relatively low. She added that more than 90% of asbestos claims filed today are based on x-ray evidence of exposure to asbestos, rather than on actual injuries.

She reported that research was proceeding on the impact of consolidating claims in asbestos litigation, including cases that have proceeded to jury verdict. She noted that most of the cases that have gone to trial have been tried in manageable groups of claims, rather than in mass trials. She said that good information can be derived from the experience of these cases as to whether plaintiffs will win at trial and how much they will recover. She stated that the results of this research will be included in the forthcoming RAND asbestos report and that the methodology used to examine asbestos cases would be used to examine other categories of mass tort cases.

Professor Hensler said that research had been initiated to compare the ways in which the common law and civil law judicial systems address mass tort cases, including an analysis of the roles that judges play in handling these cases. She noted, for example, that much of the judges' work in these cases has been administrative in nature, rather than purely judicial. She added that the research is addressing what substantive decisions judges make and what are the bases for those decisions.

Professor Hensler added that she was increasingly convinced that more attention needs to be paid to mass-tort developments occurring outside the United States. She noted that virtually every judicial system is addressing the practical and legal problems of handling large numbers of similar claims. There are, she said, a number of different approaches being used around the world to aggregate litigation.

2. Professor Henning

Professor William Henning of the University of Alabama Law School described a number of projects undertaken by the Conference of Commissioners on Uniform State Laws, which drafts substantive laws for consideration by the states. He spoke of proposed apportionment-of-fault legislation that would establish thresholds of fault before liability attaches, noting that the legislation contains provisions for reallocating fault if one of the defendants becomes insolvent or otherwise leaves the litigation. He noted that the legislation had the endorsement of the American Bar Association's Tort Trial and Insurance Practice Section, but had not been well received by the states.

He referred to the work of the Conference's Liaison with Native American Tribes Committee in adapting parts of the Uniform Commercial Code for enactment by Indian tribes to assist them in their economic development. He also described projects to draft bankruptcy-related legislation and to address a number of difficult evidence problems, such as the taking of child-witness testimony by alternative means. He also pointed out that the Conference was exploring issues arising from computer-generated demonstrative evidence, but he noted that the courts appear to be handling the evidence problems very well under the current evidence rules. He also noted that the Conference had begun projects to revise state Administrative Procedure Acts and to study internet privacy law.

3. Mr. Peck

Mr. Peck described some of the initiatives undertaken by the American Trial Lawyers Association. He explained that the organization had been concerned for some time about "secret settlements" and the potential adverse impact that undisclosed information contained in settlements may have on public health and safety. He noted that the association was attempting to gather data on settlements and to test the validity of the argument that recent court rules prohibiting sealed settlements will have a chilling effect on settlements. He stated, by way of example, that there is no indication that settlements have decreased in number since enactment of Florida's sunshine law, which makes court documents and settlements public.

Mr. Peck reported that ATLA had begun initiatives in the last few months to study the impact of summary judgment in the federal and state courts and to look at discovery abuse. He said that there had been an increasing number of complaints by ATLA members that some parties refuse to produce even garden-variety discovery materials. Some judges, he said, may not be making full use of their authority to prevent discovery abuse. Moreover, he noted, litigation seems to be increasing as to the meaning of the recent civil discovery rules amendments, which limit the scope of automatic discovery and require parties to ask the court for additional discovery. He said that the amendments have had an impact on civil practice, in that more discovery motions are being filed, almost every motion is hotly contested, and motions for sanctions appear to be on the increase.

Finally, Mr. Peck emphasized that ATLA is deeply concerned both about growing political attacks on judicial independence and the serious budget problems facing in the state courts.

4. Professor Markell

Professor Markell of the William S. Boyd School of Law at the University of Nevada, Las Vegas, spoke about the work of the National Bankruptcy Conference, an organization established in the 1930's to assist Congress in drafting the bankruptcy laws. He reported that two major areas of current interest to the Conference are asbestos litigation and international bankruptcies.

He pointed out that until Congress enacts comprehensive legislation addressing asbestos injuries, most asbestos claims will be handled in the bankruptcy courts. He noted that the number of asbestos cases will tend to increase as additional categories of cases are initiated and additional defendants are sued. He explained that Congress had amended the Bankruptcy Code in 1994 to add special provisions for asbestos cases, but the changes had not worked out particularly well in practice. He added that the National

Bankruptcy Conference had developed a series of proposed solutions to fix the problems of dealing with asbestos cases in the bankruptcy courts, including a proposed statutory amendment to authorize the appointment of representatives in bankruptcy cases to protect the interests of future claimants.

In response to a question regarding the relationship between civil and bankruptcy litigation, Professor Markell said that the bankruptcy system can be very efficient in distributing money, but the main difficulty in resolving the asbestos problem is that there is not enough money available to pay all potential claimants very much. He stated that defendant corporations and their insurance companies find the bankruptcy system attractive because it allows them to avoid further litigation generally by contributing a good deal of money. The same comfort level, however, does not apply in civil litigation. He added, though, that even in bankruptcy the problem of finality of judgment as against future claimants will continue to exist unless Congress enacts legislation establishing an administrative system. Professor Morris added that the focus in bankruptcy is not just on the victims. The bankruptcy court must consider the viability of the reorganization of the debtor and take into account the claims of trade creditors and other creditors.

Professor Hensler cautioned about the need to distinguish asbestos claims from other mass torts because asbestos has a multi-decade latency period that has led to many of the current legal problems — particularly in identifying potential claimants who have been exposed and in estimating potential damages. She said that asbestos injuries would continue for the next 30 years or so. She added, though, that, other than tobacco, it would be hard to think of another mass tort that would raise all the same problems as asbestos.

Professor Markell added that there has been a shift in the law of many states regarding liability. Fear of exposure, for example, is not a tort under some state laws. He added that the law of successive liability is also being tested in the states.

Professor Markell also reported that the National Bankruptcy Conference had worked with the International Insolvency Institute and the American College of Bankruptcy in cosponsoring a project to deal with the growing tide of bankruptcies that cross national borders. Among other things, he said, the project would try to develop a series of international principles and procedures that would apply in bankruptcy cases.

5. Ms. Refo

Ms. Refo, chair of the Litigation Section of the American Bar Association and a member of the Advisory Committee on the Evidence Rules, described a number of law-reform efforts undertaken by the Litigation Section. She pointed to the Vanishing Trial Project and its December 2003 conference in San Francisco, at which professors, judges, and lawyers explored the various reasons why trials on the merits have been decreasing

steadily. Among other things, she noted, the participants had discussed the impact of summary judgment, the diversion of cases to alternate dispute resolution, and the risks and costs of going to trial. She explained that the Section had commissioned Professor Mark Galanter of the University of Wisconsin Law School to prepare a comprehensive workbook containing extensive empirical data and analysis to document the decline of trials in both civil and criminal cases. She said that several scholarly papers had been produced for the San Francisco conference, which would be published together in an upcoming law review issue.

Ms. Refo emphasized that the San Francisco conference had not addressed whether the decline in trials was a good thing or a bad thing. Rather, she said, the participants focused on documenting the phenomenon and exploring the reasons why it is occurring. She pointed out that there had been a clear consensus among the participants that the key factor behind the decline in trials in criminal cases in the federal courts is the impact of the Federal Sentencing Guidelines, which induce defendants to plead guilty.

Ms. Refo stated that there had also been a consensus among the participants at the conference that additional, more refined court data are needed to facilitate further research and analysis. She emphasized that the Litigation Section would very much like to be involved in the formulation of new data. Professor Hensler added that she had participated in the conference, and it had prompted her to consider additional research into the reasons why fewer cases are going to trial.

Ms. Refo reported that the ABA was working on drafting a set of standards for mediators and a set of standards addressing electronic discovery issues. It was also updating its trial handbook.

She noted that the ABA was particularly concerned about the serious funding crisis facing many state court systems, viewing it as an attack on the independence of the judiciary. Finally, Ms. Refo reported that the new president of the Association had made the American jury the centerpiece of his presidency, and that she would chair the initiative, and Justice O'Connor would serve as honorary chair.

6. Professor Liebman

Professor Liebman of Columbia Law School, director of the American Law Institute, described a number of projects being undertaken by the ALI, including: (1) conducting a study of the law of complex litigation; (2) developing a set of basic international principles and rules for civil procedure; (3) recommending amendments to the federal judicial code regarding venue, supplemental jurisdiction, and removal; (4) drafting proposed federal legislation to govern enforcement of international judgments

and intellectual property judgments; and (5) studying aggregated and consolidated litigation.

7. Mr. Fox

Mr. Fox, a former member of the Advisory Committee on Civil Rules, described the current work of the American College of Trial Lawyers. He pointed out that the College was exploring ways to make the offer-of-judgment procedure in FED. R. CIV. P. 68 more useful, and it was conducting a survey of the many different offer-of-judgment procedures used in the state courts.

The College, he said, was following closely the work of the Advisory Committee on Civil Rules in considering amendments to the rules to deal with discovery of computer-generated materials. He emphasized that the organization had not reached a consensus as to whether specific amendments were needed to the Federal Rules of Civil Procedure. Rather, it was examining the area from a practical point of view, *i.e.,* to provide guidance to lawyers on how to handle electronic discovery efficiently and ethically.

Mr. Fox reported that the College had studied the area of mass torts for a considerable amount of time and had developed a very practical manual for lawyers that may also be made available to judges. In addition, he said, the College had been studying alternate dispute resolution in depth.

Mr. Fox pointed out that the Criminal Law Committee of the College would soon publish the results of a study on implementation of the rule in *Brady v. Maryland,* which requires prosecutors to produce evidence favorable to the defense. He said that the committee would propose rule amendments that would define the term "favorable information," impose a due diligence requirement on government attorneys to search for it, and establish time limits for the government to disclose it to the defense.

Finally, Mr. Fox reported that a special task force of the College was examining the federal Sentencing Guidelines and the "Feeney Amendment," which requires the courts to report downward sentencing departures to the Department of Justice.

Mr. Cecil stated that there are many opportunities for the Federal Judicial Center to collaborate and share information in connection with these various projects. He described a pending study by the Center on summary judgment in the federal courts, and he noted the Center's continuing interest in alternate dispute resolution. One of the participants noted that there is considerable interest in the bar as to whether courts are applying summary judgment properly, and he suggested that additional research into summary judgment would be very valuable. Another participant noted that it is very

difficult to prevail on summary judgment in the state courts. Yet, he said, plaintiffs do not appear to be voting with their feet by staying out of the federal courts in diversity cases to avoid summary judgment.

Mr. Cecil said that the American Bar Association's new initiative on jury trials might lead the Center to conduct a study of jury trials in the federal courts. He also emphasized the high priority that the Center had placed on international law and issues dealing with science and the law.

Mr. Peck expressed concern that several segments of society are opting out of the judicial process entirely. He pointed to the growing use by businesses of contract clauses that mandate arbitration. He asked whether there were any reliable studies as to whether arbitration is, as its advocates have claimed, more efficient and less costly. To the contrary, he said, some participants at the recent Vanishing Trial conference had asserted that arbitration is, in fact, more costly than the judicial process.

Professor Hensler responded that there are no reliable data currently available that measure the cost consequences of using binding arbitration in contractual disputes. She added that it would be very difficult to conduct such a study, although it is possible that some corporations might have conducted their own internal analyses. At most, she said, there would be a scattering of survey data that would be of questionable validity. She added that there are some data on the frequency of arbitration clauses in consumer contracts and employee contracts, but it is a moving target as the states move to amend their laws to address concerns about unconscionable provisions.

One of the participants noted an internal study of an industry that commonly uses arbitration clauses in its contracts. The study found that about 90% of all its cases in the courts settle before trial, but only 45% of its arbitration cases settle. Industry parties, moreover, lose twice as frequently in arbitration as in court proceedings. Nevertheless, he said, the damages awarded by arbitrators were found to be in a much tighter range than those rendered in court cases. In other words, there were very few "outliers" in awards by arbitrators compared to court cases. Moreover, some jury verdicts were seen as clearly excessive. The study, thus, concluded that parties who opted for arbitration were essentially opting for less uncertainty as to the amount of damage.

Ms. Refo added that this result was consistent with statements made at the Vanishing Trial symposium. Lawyers, she said, asserted that they could project reasonably well what an "average" verdict would be if a case went to trial. But they simply could not project whether their case would be the outlying case. That unpredictability, she said, seemed to be encouraging settlements and the use of arbitration.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, June 17-18, 2004, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

3A

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

May 19, 2004

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Thirty-four bills were introduced in the 108th Congress that affect the Federal Rules of Practice and Procedure. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following bills.

Crime Victims' Rights

On April 21, 2004, Senator Kyl introduced the "Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act" (S. 2329, 108th Cong., 2nd Sess.). The bill represents a compromise between lawmakers who supported and opposed a resolution to amend the Constitution to guarantee victims' rights (S.J. Res. 1, 108th Cong., 1st Sess.). S. 2329 passed the Senate, with one amendment, by a vote of 96-1 on April 22, 2004. Representative Chabot introduced a virtually identical bill on May 12, 2004 (H.R. 4342, 108th Cong., 2nd Sess.). It was reported that the President will sign the legislation if passed by both Houses of Congress.

Both bills add a new chapter to Title 18 of the U.S. Code establishing rights for crime victims. The bill gives a crime victim—defined as a person directly and proximately harmed as a result of the commission of a federal felony or misdemeanor offense—the right to be protected from the accused; reasonable notice of any public proceeding involving the crime or release or escape of the accused; be heard at any public proceeding involving release, plea, or sentencing (present Criminal Rule 32(i)(4)(B) permits only a victim of a violent crime or sexual abuse to speak at sentencing); confer with the prosecutor in the case; full and timely restitution; proceedings free of unreasonable delay; and be treated fairly and with respect for his or her privacy. The legislation also sets forth a number of enforcement mechanisms available to the crime victim, such as the right to seek a writ of mandamus from the appropriate court of appeals, which must be decided promptly by the court. The bills also direct the Administrative Office to report to Congress the number of times that a crime victim was denied rights under the legislation and the reason for such denial.

E-Government Act

Section 205(c) of the E-Government Act of 2002 (Pub. L. No. 107-347) requires, among other things, the Supreme Court to promulgate rules under the Rules Enabling Act to protect the privacy and security of documents filed electronically. The Department of Justice raised concerns that under the legislation, courts were not accepting unredacted documents for filing. On October 7, 2003, the House of Representatives passed a bill, "To Amend the E-Government Act of 2002 with respect to Rulemaking Authority of the Judicial Conference." (H.R. 1303, 108th Cong., 1st Sess.) The bill authorizes a party to file, under seal, an unredacted version of the document (with the redacted version available for public use) or a reference list that identifies redacted information, which can be accessed by the parties and court.

Judge Levi established the Subcommittee on E-Government—chaired by Judge Sidney A. Fitzwater and comprised of representatives from the five advisory rules committees and the Committee on Court Administration and Case Management—to develop proposed rule amendments to implement the E-Government Act. At its January 14, 2004, meeting, the subcommittee directed Professor Daniel J. Capra, the lead reporter to the subcommittee, to draft a template rule to be considered by the advisory rules committees. At their spring 2004 meetings, the Bankruptcy and Criminal Advisory Rules Committees considered the template privacy rule, while the Appellate and Civil committees considered a modified version. At the same time, model local rules and guidance, which had been approved by the Judicial Conference regarding the electronic filing of criminal case papers, were sent to the courts. At the various meetings of the advisory committees, the Department of Justice raised concerns about the proposals.

The subcommittee is scheduled to meet on June 16, 2004, to discuss the various proposals and continue to work out a consensus on a uniform rule proposal. In fall 2004, the advisory committees will review revised drafts and specific modifications addressing issues affecting only their set of rules, with the goal of going to the Standing Committee in June 2005 with recommendations to publish proposed amendments for public comment in August 2005.

Class Actions

On February 10, 2004, Senator Grassley introduced the "Class Action Fairness Act of 2004" (S. 2062, 108th Cong., 2st Sess.). The bill represents a compromise that was reached by the Senate Republican leadership and three prominent Democrats after a petition to invoke cloture, or limit debate, to consider an earlier class-action bill (S. 1751, "Class Action Fairness Act of 2003," 108th Cong., 1st Sess.) was defeated by a single vote in October 2003 (59-39). The highlights of the legislation are set forth in the December 16, 2003, memorandum to the Standing Committee contained in the agenda book for the Committee's January 15-16, 2004, meeting.

S. 2062 raises a number of complicated issues as to how the legislation will work, particularly with the jurisdictional provisions. At this time, we understand that Senate Majority Leader Bill Frist plans to bring the bill to the Senate floor for debate sometime in early June 2004. On June 12, 2003, the House passed a similar class-action bill, H.R. 1115 (108th Cong., 1st Sess.), by a vote of 253-170.

Bail Bond Forfeitures

On May 15, 2003, Representative Keller introduced the "Bail Bond Fairness Act of 2003." (H.R. 2134, 108th Cong., 1st Sess.) The bill, which is similar to legislation introduced in previous Congresses, would amend Criminal Rule 46 to restrict a judge's authority to forfeit a bail bond only when the defendant fails to appear before the court as ordered. (The existing rule permits a judge to forfeit a bail bond if a defendant fails to abide by any release condition.) Senator Graham introduced a similar measure, "Bail Bond Fairness Act of 2003" (S. 1795, 108th Cong., 1st Sess.), on October 29, 2003. The House Judiciary Committee favorably reported H.R. 2134 by acclamation on September 10, 2003.

About a month ago, Chairman Sensenbrenner, at the request of the Department of Justice and the Administrative Office, interceded and blocked H.R. 2134. At the request of congressional staffers, lobbyists for the bail bond industry have met with representatives from the Department of Justice and the Administrative Office to explore the possibility of presenting suggested rule changes in accordance with the Rules Enabling Act rulemaking process. There has been no further action on H.R. 2134 or S. 1795.

Asbestos

On May 22, 2003, Senator Hatch introduced the "Fairness in Asbestos Injury Resolution Act of 2003." (S. 1125, 108th Cong., 1st Sess.) The bill, as amended, would create a no-fault trust fund that would compensate individuals exposed to asbestos. The bill established medical criteria, award values for each category of disease, and a provision to ensure that the trust fund remains solvent. The Senate Judiciary Committee reported the bill in July 2003, essentially along party-lines, by a vote of 10-8.

The legislation raised a number of concerns from Democrats and Republicans, as well as from some of the stakeholders to asbestos litigation, including the amount of the trust fund and the amount each stakeholder was required to contribute to the fund, award values to be paid to eligible claimants, and steps necessary to keep the trust fund solvent. At the request of Senator Specter, Judge Edward R. Becker held numerous meetings with representatives from Congress, defendant companies, labor organizations, claimants' attorneys, and insurance companies in an attempt to broker a compromise.

On April 7, 2004, Senator Hatch introduced the "Fairness in Asbestos Injury Resolution Act of 2004." (S. 2290, 108th Cong., 2nd Sess.) While many Senators supported the bill, a number of members argued that the size of the trust fund was inadequate to pay all the eligible claimants. On April 22, 2004, a vote was held on a motion to invoke cloture on S. 2290. The vote was 50-47, falling well short of the 60 votes needed to consider the legislation.

James N. Ishida

Attachments

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
108th Congress

SENATE BILLS

● S. 151 - *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*

- Introduced by: Hatch
- Date Introduced: 1/13/03
- Status: Read twice and referred to the Senate Committee on the Judiciary (1/13/03). Senate Judiciary Committee reported favorably with amendments (1/30/03). Report No. 108-2 filed (2/11/03). Passed Senate by a vote of 84-0 (2/24/03). Referred to House Judiciary Committee (2/25/03). Referred to House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03). House inserted own version of bill. Chairman Sensenbrenner requested conference (3/27/03). Conferees appointed (3/27/03, 3/31/03, 4/3/03). Conference report 108-66 filed (4/9/03). House agreed to conference report by a vote of 400-25 (4/10/03). Senate agreed to conference report by a vote of 98-0 (4/10/03). Signed by President (4/30/03) (Pub. L. 108-21).
- Related Bills: S. 885, H.R. 1046
- Key Provisions:

  — Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

● S. 274 - *Class Action Fairness Act of 2003*

- Introduced by: Grassley
- Date Introduced: 2/4/03
- Status: Read twice and referred to the Senate Committee on the Judiciary (2/4/03). Judiciary Committee approved the bill with two amendments by a vote of 12-7 and ordered it reported out of committee (4/11/03). Placed on Senate Legislative Calendar (6/2/03). Report No. 108-123 filed (7/31/03). Senate Amendment 2232 (1/20/04).
- Related Bills: S. 1751, S. 1769, H.R. 1115
- Key Provisions:

  — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and

---

[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), publication of settlement information in plain English, and notification of proposed settlement to appropriate state and federal officials.

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $2 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state. The above provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100.

— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts.

— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

[As amended, only class actions involving at least $5 million would be eligible for federal court. Further, in class actions where more than two-thirds of the plaintiffs are from the same state, the case would remain in state court automatically. In class actions where between one-third and two-thirds of the plaintiffs are from the same state as the defendant, the court has the discretion to accept removal or remand the case back to state court based on five specified factors. The second amendment deleted language from Section 4 that classified "private attorney general" as class actions.]

[Senate Amendment 2232 made numerous amendments to S. 274, including a provision that allows an appellate court to accept an appeal from an order granting or denying a motion to remand if the motion is made within 7 days after entry of

order. If the appellate court accepts an appeal, the court must complete review within 60 days after the appeal was filed, unless an extension of time is granted.]

- S. 413 - *Asbestos Claims Criteria and Compensation Act of 2003*
  - Introduced by: Nickles
  - Date Introduced: 2/13/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (2/13/03).
  - Related Bills: H.R. 1586
  - Key Provisions:

    — Section 4 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing that he or she suffers from a medical condition to which exposure to asbestos was a substantial contributing factor.

    — Section 5 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person and that person's household.

    — Section 5 also provides that a plaintiff may file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

    — Section 5 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 5. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- S. 554 - *A bill to allow media coverage of court proceedings*
  - Introduced by: Grassley
  - Date Introduced: 3/6/03
  - Status: Referred to the Senate Judiciary Committee (3/6/03). Senate Judiciary Committee reported bill without amendment favorably (5/22/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 states that the presiding judge of an appellate or district court has the discretionary authority to allow the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides.

    — Section 2 also directs the presiding district court judge to inform each non-party witness that the witness has the right to request that his or her image and voice be obscured during the witness's testimony.

    — Section 2 specifies that the Judicial Conference may promulgate advisory guidelines on the management and administration of media access to court

proceedings.

— Section 3 contains a "sunset" provision that terminates the authority of district court judges to allow media access three years after the date the Act is enacted.

- S. 578 - *Tribal Government Amendments to the Homeland Security Act of 2002*
  - Introduced by: Inouye
  - Date Introduced: 3/7/03
  - Status: Referred to the Senate Committee on Governmental Affairs (3/7/03). Senate Indian Affairs Committee held hearing (7/30/03).
  - Related Bills: H.R. 2242
  - Key Provisions:

    — Section 12 amends, inter alia, **Criminal Rule 6(e)(3)(C)** by replacing "federal, state . . . " with "Federal, State, tribal . . .."

- S. 644 - *Comprehensive Child Protection Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 3/18/03
  - Status: Referred to the Senate Judiciary Committee (3/18/03).
  - Related Bills: None
  - Key Provisions:

    — Section 6 amends **Evidence Rule 414(a).** The amendment would allow the admission of evidence, in a child molestation case, that the defendant had committed the offense of possessing sexually explicit materials involving a minor. Section 6 also amends the definition of a "child" to include those persons below the age of 18 (instead of the current age of 14).

    — Section 7 amends **28 U.S.C. chapter 119** by adding a new section 1826A that would make the marital communication privilege and the adverse spousal privilege inapplicable in any federal proceeding in which one spouse is charged with a crime against (a) a child of either spouse, or (b) a child under the custody or control of either spouse.

- S. 805 - *Crime Victims Assistance Act of 2003*
  - Introduced by: Leahy
  - Date Introduced: 4/7/03
  - Status: Read twice and referred to the Senate Judiciary Committee (4/7/03).
  - Related Bills: None
  - Key Provisions:

    — Section 103 amends **Criminal Rule 11** by inserting a new subdivision that requires the court, before entering judgment following a guilty plea from the defendant, to ask whether the victim has been consulted on the guilty plea and whether the victim has any views on the plea. Section 103 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the **Criminal Rules** that give victims

the opportunity to be heard on whether the court should accept the defendant's guilty or no contest plea.

--- Section 105 amends **Criminal Rule 32 of the Federal Rules of Criminal Procedure** by affording victims an "enhanced" opportunity to be heard at sentencing. Section 105 also directs the Judicial Conference to submit a report to Congress, within 180 days after enactment, recommending amendments to the **Criminal Rules** that give victims enhanced opportunities to participate "during the pre-sentencing and sentencing phase of the criminal process."

- S. 817 - *Sunshine in Litigation Act of 2003*
  - Introduced by: Kohl
  - Date Introduced: 4/8/03
  - Status: Read twice and referred to the Senate Judiciary Committee (4/8/03).
  - Related Bills: None
  - Key Provisions:

    --- Section 2 amends **28 U.S.C. chapter 111** by inserting a new section 1660. New section 1660 states that a court shall not enter an order pursuant to **Civil Rule 26(c)** that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricting access to court records in a civil case unless the court conducts a balancing test that weighs the litigants' privacy interests against the public's interest in health and safety.

    --- Section 3 provides that the amendments shall take effect (1) 30 days after the date of enactment, and (2) apply only to orders entered in civil actions or agreements entered into after the effective date.

- S. 885 - *Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003*
  - Introduced by: Kennedy
  - Date Introduced: 4/10/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (4/10/03).
  - Related Bills: S. 151
  - Key Provisions:

    --- Section 610 amends **Criminal Rule 7(c)(1)** to permit the naming of an unknown defendant in an indictment so long as that defendant has a particular DNA profile as defined in 18 U.S.C. § 3282.

- S. 1023 - *To increase the annual salaries of justices and judges of the United States*
  - Introduced by: Hatch
  - Date Introduced: 5/7/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/7/03). Ordered to be reported with amendments favorably (5/22/03). Placed on Senate Legislative Calendar (6/18/03).

- Related Bills: S. 554

  -- Section 3 authorizes the presiding judge of an appellate or district court to allow the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides. Section 3 also directs the presiding district judge to inform each non-party witness that the witness has the right to request that his or her image and voice be obscured during the witness's testimony. Section 3 provides that the Judicial Conference may promulgate advisory guidelines on the management and administration of the above photographing, televising, broadcasting, or recording of court proceedings. The authority of a district judge under this act shall terminate 3 years after the date of enactment of the act.

- S. 1125 - *Fairness in Asbestos Injury Resolution Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 5/22/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/22/03). Senate Judiciary Committee held hearing (6/4/03). Markup session held (6/19/03, 6/24/03, 6/26/03). Senate Judiciary Committee reported favorably with amendments (7/10/03). Report No. 108-118 filed (7/30/03). Placed on Senate Calendar (7/30/03).
  - Related Bills: S. 2290
  - Key Provisions:

    — Section 101 amends **Part I of title 28, U.S.C.**, to create a new five-judge Article I court called the United States Court of Asbestos Claims. The Act also sets forth procedures governing: filing of claims, medical criteria, awards, funding allocation, and judicial review.

    — Section 402 states the Act's effect on bankruptcy laws.

    — Section 403 provides that the Act supersedes federal and state law insofar as these laws may relate to any asbestos claim filed under the Act. Section 403 also makes clear that the Act's remedies shall be the exclusive remedy for any asbestos claim filed under any federal or state law.

- S. 1700 - *Advancing Justice Through DNA Technology Act of 2003*
  - Introduced by: Hatch
  - Date Introduced: 10/1/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/1/03).
  - Related Bills: H.R. 3214
  - Key Provisions:

    — Section 311 amends **Part II of Title 18, U.S.C.,** by adding a new chapter 228A regarding post-conviction DNA testing. Under new section 3600(g)(1), the statute would provide that an inmate whose DNA test results excludes him or her "as the source of the DNA evidence," may file a motion for new trial or resentencing notwithstanding any rule or law that would bar such a motion as untimely.

- S. 1701 - *Reasonable Notice and Search Act*
  - Introduced by: Feingold
  - Date Introduced: 10/2/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/2/03).
  - Related Bills: S. 1709
  - Key Provisions:

    —Section 2 of the bill amends, inter alia, **18 U.S.C. section 3103a(b)** by setting a specific time limit in which the government may delay giving notice that a search warrant has been issued. Under section 2, the giving of such notice may be delayed by no more than 7 calendar days. This 7-day period may be extended for additional periods of up to 7 calendar days if a court finds on each application: (1) reasonable cause to believe that notice of the execution of the warrant will endanger the life or physical safety of an individual, (2) result in flight from prosecution, or (3) result in the destruction or tampering of evidence sought under the warrant. [Presently, the statute allows the government to delay giving notice for an unspecified period if the search warrant states that notice will be given "within a reasonable period of its execution."]

    —Section 2 also provides that Attorney General shall report to the Congress semiannually (a) all requests for delays of notice, and (b) all requests for extensions of notice under section 3103a(b).

    —Section 3 states that the provisions of this act shall sunset on December 31, 2005.

- S. 1709 - *Security Freedom Ensured Act of 2003 or the SAFE Act*
  - Introduced by: Craig
  - Date Introduced: 10/2/03
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/2/03).
  - Related Bills: S. 1701
  - Key Provisions:

    —Section 3 of the bill amends, inter alia, **18 U.S.C. section 3103a(b)** by setting a specific time limit in which the government may delay giving notice that a search warrant has been issued. Under section 3, the giving of such notice may be delayed by no more than 7 days after execution of the warrant. This 7-day period may be extended for additional periods of up to 7 days if a court finds on each application: (1) reasonable cause to believe that notice of the execution of the warrant will endanger the life or physical safety of an individual, (2) result in flight from prosecution, or (3) result in the destruction or tampering of evidence sought under the warrant. [Presently, the statute allows the government to delay giving notice for an unspecified period if the search warrant states that notice will be given "within a reasonable period of its execution."]

    —Section 3 also provides that Attorney General shall report to the Congress semiannually (a) all requests for delays of notice, and (b) all requests for extensions of notice under section 3103a(b).

—Section 3 states that the provisions of this act shall sunset on December 31, 2005.

- S. 1751 - *Class Action Fairness Act of 2003*
  - Introduced by: Grassley
  - Date Introduced: 10/17/03
  - Status: Read twice and placed on Senate Legislative Calendar (10/17/03). Motions to proceed to consideration (10/17/03 and 10/20/03). Cloture motion presented in Senate (10/20/03). Cloture on the motion to proceed not invoked by a vote of 59-39 (10/22/03).
  - Related Bills: S. 274, S. 1769, H.R. 1115
  - Key Provisions:

— Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), publication of settlement information in plain English, and notification of proposed settlement to appropriate state and federal officials.

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state.

A district court may decline to exercise jurisdiction as provided above in a class action case where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws other than those of the state where the action was originally filed, (c) in the case of a state class action, whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (e) whether one or more class actions asserting the same or similar claims on behalf of the same or other persons have been or may be filed.

— Section 4 also contains a provision governing mass tort cases ("For purposes of this section and section 1453 of this title, a mass action shall be deemed to be a class action." This language is not included in the related bill, S. 274.)

A district court may not exercise jurisdiction over any class action as provided above where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state in which the action was filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100.
— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts.
— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

- S. 1769 - *National Class Action Act of 2003*
  - Introduced by: Breaux
  - Date Introduced: 10/21/03
  - Status: Read twice and referred to the Committee on the Judiciary (10/21/03).
  - Related Bills: S. 274, S. 1751, H.R. 1115
  - Key Provisions:

    — Section 2 amends **Part V of title 28, U.S.C.**, to include a new chapter on the review and approval of proposed coupon settlements in class action cases.
    — Section 3 amends **Chapter 85 of title 28, U.S.C.**, to add a new provision titled "National class actions." Under the new provision, (1) a district court shall have jurisdiction over a class action in which 1/3 or fewer of the plaintiff class are citizens of the state where the action was originally filed; (2) a district court may decline to exercise jurisdiction over a class action in which greater than 1/3 but less than 2/3 of the plaintiff class are citizens of the state where the action was originally filed. In making its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of state or local interest, (b) whether the claims asserted will be governed by the laws other than those of the state where the action was originally filed, (c) whether the forum was chosen in bad faith or frivolously, (d) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (e) whether the state claims asserted by class members of the state in which the action was filed would be preempted by a federal class action; (3) a district court may not exercise jurisdiction over a class action where (a) 2/3 or more of the plaintiff class are citizens of the state where the action was originally

filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100; and (4) the new provision does not apply to any class action that involves only claims (a) concerning a covered security, (b) that relates to the internal affairs or governance of a corporation or other business enterprise, or (c) that relates to the rights, duties, and obligations relating to or created by any security.

- S. 1795 - *Bail Bond Fairness Act of 2003*
  - Introduced by: Graham
  - Date Introduced: 10/29/03
  - Status: Referred to the Senate Committee on the Judiciary (10/29/03).
  - Related Bills: H.R. 2134
  - Key Provisions:

    — Section 3 amends, among other things, **Criminal Rule 46(f)(1)** by providing that the district court declare bail forfeited only when the defendant fails to physically appear before the court. (The existing rule provides that the court declare bail forfeited if a condition of the bond is breached.)

- S. 2062 - *Class Action Fairness Act of 2004*
  - Introduced by: Grassley
  - Date Introduced: 2/10/04
  - Status: Introduced, read and placed on Senate Legislative Calendar (2/10/04). Read a second time and placed on legislative calendar (2/11/04).
  - Related Bills: S. 274, S. 1751, S. 1769, H.R. 1115
  - Key Provisions:

    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), and notification of proposed settlement to appropriate state and federal officials. (Unlike S. 1751, there is no plain English requirement.)

    — Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state. A district court may decline to exercise jurisdiction as provided above in a class action case where more than 1/3 but less than 2/3 of the plaintiff class members

and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states, (c) whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the class action was brought in a forum with sufficient nexus with the plaintiff class members, (e) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (f) whether, during the three-year period preceding the filing of the class action, one or more claims asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.
— Section 4 also contains a provision governing mass tort cases ("For purposes of this section and section 1453 of this title, a mass action shall be deemed to be a class action." This language is not included in the related bill, S. 274.) The section further provides that any action removed pursuant to the subsection shall not thereafter be transferred to any other court pursuant to 28 U.S.C. § 1407, unless a majority of the plaintiffs request the transfer.

In addition, like the predecessor legislation, a district court may not exercise jurisdiction over any class action as provided above where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state in which the action was filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100. S.2062 adds additional grounds for excluding class actions from federal jurisdiction: (1) more than 2/3 of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was filed; (2) at least one defendant is a party from whom plaintiffs seek "significant relief," whose conduct forms a "significant basis" for plaintiffs' claims, and who is a citizen of the State where the action was originally filed; (3) the principal injuries resulting from the alleged conduct occurred in the State where the action was originally filed; and (4) a class action "asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" was filed during the three-year period preceding the filing of the class action.
— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts. Section 5 also provides that the court of appeals may consider an appeal from a district court's remand order. If the court of appeals accepts the appeal, the court must render a decision within 60 days after the appeal was filed, unless an extension of time is granted. (An extension of time may be granted for no more

than 10 days.)

— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

— Section 7 states that the amendments to Civil Rule 23, which were approved by the Supreme Court on March 27, 2003, would take effect on the date of enactment or December 1, 2003, whichever occurred first.

- S. 2290 - *Fairness in Asbestos Injury Resolution Act of 2004*
  - Introduced by: Hatch
  - Date Introduced: 4/7/04
  - Status: Introduced in the Senate (4/7/04). Read second time and placed on Senate Calendar (4/8/04). Petition to invoke cloture failed by a vote of 50 - 47 (4/22/04).
  - Related Bills: S. 1125
  - Key Provisions:

— Section 101 establishes within the Department of Labor the Office of Asbestos Disease Compensation. The office is charged with processing claims for compensation for asbestos-related injuries and paying compensation to eligible claimants under criteria and procedures established under the act. Under section 112, a claimant is not required to prove that his or her asbestos-related injury was caused by the negligence or fault of another person or entity.

— Section 221 establishes the Asbestos Injury Claims Resolution Fund, which shall be used to pay allowable asbestos-related claims.

— Section 301 states that the Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction over any action to review rules or regulations promulgated by the office administrator or the Asbestos Insurers Commission.

— Section 403 provides that the act supersedes federal and state law insofar as these laws may relate to any asbestos claim filed under the act. Section 403 also makes clear that the act's remedies shall be the exclusive remedy for any asbestos claim filed under any federal or state law.

- S. 2329 - *Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*
  - Introduced by: Kyl
  - Date Introduced: 4/21/04
  - Status: Introduced in the Senate and read twice (4/21/04). Considered and passed by the

Senate with an amendment by a vote of 96-1 (4/22/04).
• Related Bills: S.J. Res. 1, H.J. Res. 10, H.J. Res. 48
• Key Provisions:
— Section 2 amends **Title 18 of the United States Code** by adding a new chapter on the rights of crime victims. The bill provides that a crime victim (defined as a person directly and proximately harmed as a result of the commission of a federal offense) has a number of rights such as the right to be protected from the accused, the right to reasonable notice of any public proceeding involving the crime or release/escape of the accused, and the right to be heard at any public proceeding involving release, plea, or sentencing. Section 2 also sets forth enforcement measures available to the crime victims.
— Section 4 directs the Administrative Office to report to Congress the number of times that a crime victim was denied rights under the legislation, and the reason for such denial.

HOUSE BILLS

● H.R. 538 - *Parent-Child Privilege Act of 2003*
• Introduced by: Andrews
• Date Introduced: 2/5/03
• Status: Referred to the House Committee on the Judiciary (2/5/03). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (5/5/2003).
• Related Bills: None
• Key Provisions:
— Section 2 amends **Article V of the Federal Rules of Evidence** by establishing a parent-child privilege. Under proposed **new Evidence Rule 502(b)**, neither a parent or a child shall be compelled to give adverse testimony against the other in a civil or criminal proceeding. Section 2 also provides that neither a parent nor a child shall be compelled to disclose any confidential communication made between that parent and that child.

● H.R. 637 - *Social Security Number Misuse Prevention Act*
• Introduced by: Sweeney
• Date Introduced: 2/5/03
• Status: Referred to the House Committees on the Judiciary and Ways and Means (2/5/03). Referred to the House Ways and Means' Subcommittee on Social Security (2/19/03). Referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (3/6/03).
• Related Bills: None
• Key Provisions:
— Section 3 amends **chapter 47 of title 18, U.S.C.**, to prohibit the sale, public display, or purchase of a person's social security number without that person's affirmatively expressed consent.
— Section 4 states that the above prohibition does not apply to a "public record." Section 4 defines "public record" to mean "any governmental record that is made available to the public." (One exception to section 4 is public records posted on

the Internet: "Section 1028A shall apply to any public record first posted onto the Internet or provided in an electronic medium by, or on behalf of a government entity after the date of enactment of this section, except as limited by the Attorney General[.]")

— Section 4 also provides that the Comptroller of the United States, in consultation with the Administrative Office of the U.S. Courts, shall conduct a study and prepare a report on the use of social security numbers in public records.

- H.R. 700 - *Openness in Justice Act*
  - Introduced by: Paul
  - Date Introduced: 2/11/03
  - Status: Referred to the House Committee on the Judiciary (2/11/03). Referred to the House Judiciary's Subcommittee on Courts, the Internet, and Intellectual Property (3/6/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 inserts a new Rule 49 in the Federal Rules of Appellate Procedure. Proposed Rule 49(a) would require the courts to issue a written opinion in the following cases: (1) a civil action removed from state court, (2) a diversity jurisdiction case in which the amount in controversy exceeds $100,000, and (3) any appeal involving the use of the court's inherent powers. In addition, any party on direct appeal may request a written opinion under proposed Rule 49(b).

- H.R. 781 - *Privacy Protection Clarification Act*
  - Introduced by: Biggert
  - Date Introduced: 2/13/03
  - Status: Referred to the House Committee on Financial Services (2/13/03). Referred to the House Financial Services' Subcommittee on Financial Institutions and Consumer Credit (3/10/03).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends the Gramm-Leach-Bliley Financial Modernization Act (Pub. L. No. 106-102) to exempt attorneys from the privacy provisions of the Act. Specifically, section 2 defines "financial institution" to exclude attorneys who are subject to, and are in compliance with, client-confidentiality provisions under their state, district, or territory's professional code of conduct.

- H.R. 975 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2003*
  - Introduced by: Sensenbrenner
  - Date Introduced: 2/27/03
  - Status: Referred to the House Committees on the Judiciary and Financial Services (2/27/03). Referred to the House Judiciary Committee Subcommittee on Commercial and Administrative Law (2/28/03). Subcommittee hearings held (3/4/03). Subcommittee

discharged (3/7/03). Committee consideration and mark-up session held. Committee ordered bill to be reported by a vote of 18-11 (3/12/03). House Report 108-40 filed (3/18/03). Passed the House with several amendments by a vote of 315-113 (3/19/03). Received in the Senate, read the first time, and placed on Senate Legislative Calendar (3/20/03). Read the second time and placed on Senate Legislative Calendar (3/21/03).

• Related Bills: None

• Key Provisions:

— Section 221 amends **11 U.S.C. § 110** by inserting a new provision that allows the Supreme Court to promulgate rules under the Rules Enabling Act or the Judicial Conference to prescribe guidelines that establish a maximum allowable fee chargeable by a bankruptcy petition preparer.

— Section 315 states that within 180 days after the bill is enacted, the Director of the Administrative Office of the U.S. Courts shall establish procedures for safeguarding the confidentiality of any tax information required to be provided under this section. Section 315 also directs the Director to prepare and submit a report to Congress on, among other things, the effectiveness of said procedures.

— Section 319 expresses the sense of Congress that **Bankruptcy Rule 9011** should be amended to require the debtor or debtor's attorney to verify that information contained in all documents submitted to the court or trustee be (a) well grounded in law and (b) warranted by existing law or a good-faith argument for extension, modification, or reversal of existing law.

— Section 419 directs the Advisory Committee on Bankruptcy Rules to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** that require Chapter 11 debtors to disclose certain information by filing and serving periodic financial reports. The required information shall include the value, operations, and profitability of any closely held corporation, partnership, or any other entity in which the debtor holds a substantial or controlling interest.

— Section 433 directs the Advisory Committee on Bankruptcy Rules to, within a reasonable time after the date of enactment, propose new **Bankruptcy Forms** on disclosure statements and plans of reorganization for small businesses.

— Section 434 adds **new section 308 to 11 U.S.C. chapter 3** (debtor reporting requirements). Section 434 also stipulates that the effective date "shall take effect 60 days after the date on which rules are prescribed under section 2075 of title 28, United States Code, to establish forms to be used to comply with section 308 of title 11, United States Code, as added by subsection (a)."

— Section 435 directs the Advisory Committee on Bankruptcy Rules to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** to assist small business debtors in complying with the new uniform national reporting requirements.

— Section 601 amends **chapter 6 of 28 U.S.C.,** to direct: (1) the clerk of each district court (or clerk of the bankruptcy court if certified pursuant to section 156(b) of this title) to compile bankruptcy statistics pertaining to consumer credit debtors seeking relief under Chapters 7, 11, and 13; (2) the Director of the

Administrative Office of the U.S. Courts to make such statistics available to the public; and (3) the Director of the Administrative Office of the U.S. Courts to prepare and submit to Congress an annual report concerning the statistics collected. This report is due no later than June 1, 2005.

— Section 604 expresses the sense of Congress that: (1) it should be the national policy of the United States that all public data maintained by the bankruptcy clerks in electronic form should be available to the public and released in usable electronic form subject to privacy concerns and safeguards as developed by Congress and the Judicial Conference.

— Section 716 expresses the sense of Congress that the Advisory Committee on Bankruptcy Rules should, as soon as practicable after the bill is enacted, propose amendments to the **Bankruptcy Rules** regarding an objection to the confirmation plan filed by a governmental unit and objections to a claim for a tax filed under Chapter 13.

— Section 1232 amends **28 U.S.C. § 2075** to insert: "The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement."

— Section 1233 amends **28 U.S.C. § 158** to provide for direct appeals of certain bankruptcy matters to the circuit courts of appeals.

[On January 28, 2004, the House voted 265-99 to append the language of H.R. 975 to S. 1920 (a bill "to extend for 6 months the period for which Chapter 12 of title 11 of the United States Code is reenacted").]

- H.R. 1115 - *Class Action Fairness Act of 2003*
  - Introduced by: Goodlatte
  - Date Introduced: 3/6/03
  - Status: Referred to the House Committee on the Judiciary (3/6/03). House Judiciary Committee held hearing (5/15/03). House Judiciary Committee held markup and ordered bill reported, with two amendments, favorably by a vote of 20-14 (5/21/03). House Report No. 108-144 filed (6/9/03). H. Amdt. 167 approved (6/12/03). Passed the House by a vote of 253-170 (6/12/03). Received in Senate and referred to Judiciary Committee (6/12/03).
  - Related Bills: S. 274, S. 1751, S. 1769
  - Key Provisions:

    — Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and against discrimination based on geographic location), and the publication of settlement information in plain English.

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $2 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state. These provisions do not apply in any civil action where (a) the substantial majority of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed, and the claims asserted will be governed primarily by the laws of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of proposed plaintiff class members is less than 100.
— Section 5 provides for removal of interstate class actions to a federal district court and for review of orders remanding class actions to state courts.
— Section 6 amends **section 1292(a) of title 28, U.S.C.**, to allow appellate review of orders granting or denying class certification under Civil Rule 23. Section 6 also provides that discovery will be stayed pending the outcome of the appeal.

[As amended on May 21, 2003, the first amendment accelerates the Civil Rule 23 amendments that were approved by the Supreme Court on March 27, 2003, to the date of enactment or December 1, 2003, whichever is earlier. The second amendment revised the effective date of the legislation. The legislation will apply to all pending cases in which the class certification decision has not yet been made.]

[House Amdt. 167 raises the aggregate amount in controversy required for federal court jurisdiction from $2 million to $5 million. The amendment also gives federal courts discretion to return intrastate class actions to state courts after weighing five factors to determine if the case is of a local character. This discretion would come into play when between one-third and two-thirds of the plaintiffs are citizens of the same state as the primary defendants. If more than two-thirds are citizens of the same state, the case would remain in state court.]

● H.R. 1303 - *To amend the E-Government Act of 2002 with respect to rulemaking authority of the Judicial Conference.*

• Introduced by: Smith
• Date Introduced: 3/18/03
• Status: Referred to the House Committee on the Judiciary (3/18/03). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/19/03). Subcommittee held mark-up session and subsequently voted to forward the bill to the full committee (3/20/03). House Judiciary Committee held mark-up session, approved amendments, and ordered to be reported (7/16/03). House Report 108-239 filed

(7/25/03). House passed by voice vote (10/7/03). Received in the Senate, read twice, and referred to the Committee on Governmental Affairs (10/14/03).

- Related Bills: None
- Key Provisions:

— As amended, Section 1 amends Section 205(c) of the E-Government Act of 2002 (Pub. L. 107-347) by requiring the Judicial Conference to promulgate rules that protect privacy and security interests pertaining to the filing and public availability of electronic documents. [The bill, as introduced, would have amended Section 205(c) of the E-Government Act of 2002 by providing that the Judicial Conference *may* promulgate rules to protect privacy and security interests pertaining to documents filed electronically with the courts.] Section 1 also amends the E-Government Act of 2002 by allowing a party to file an unredacted document under seal that will be part of the court record. In the court's discretion, this unredacted document will either be in lieu of, or in addition to, a redacted copy in the public file.

- H.R. 1586 - *Asbestos Compensation Fairness Act of 2003*
  - Introduced by: Cannon
  - Date Introduced: 4/3/03
  - Status: Referred to the House Committee on the Judiciary (4/3/03).
  - Related Bills: S. 413
  - Key Provisions:

— Section 3 states that no person shall file a civil action alleging a nonmalignant asbestos claim unless the person makes a prima facie showing of physical impairment resulting from a medical condition to which exposure to asbestos was a substantial contributing factor.

— Section 4 provides that a court may consolidate for trial any number and type of asbestos claims with the consent of all parties. Without such consent, the court may consolidate for trial only those claims relating to the same exposed person and that person's household.

— Section 4 also provides that a plaintiff must file a civil action in the state of his or her domicile or in the state where the plaintiff was exposed to asbestos, such exposure being a substantial contributing factor to the physical impairment upon which plaintiff bases his or her claim.

— Section 4 further directs that any party may remove the action to federal court if the state court fails to comply with the procedural requirements in section 4. The federal court shall have jurisdiction of all civil actions removed, without regard to the amount in controversy and without regard to the citizenship or residence of the parties.

- H.R. 1768 - *Multidistrict Litigation Restoration Act of 2003*
  - Introduced by: Sensenbrenner
  - Date Introduced: 4/11/03

• Status: Referred to the House Committee on the Judiciary (4/11/03). Referred to the Subcommittee on Courts, the Internet, and Intellectual Property (5/5/2003). Subcommittee held mark-up session and forwarded to full committee (7/22/03). Committee held markup session and ordered bill reported by voice vote (1/28/04). House Report No. 108-416 filed (2/10/04). House passed bill by a vote of 418-0 (March 24, 2004). Received in the Senate and referred to the Senate Judiciary Committee (3/25/04).
• Related Bills: None.
• Key Provisions:

— Section 2 amends **28 U.S.C. § 1407** to permit the transferee court in a multidistrict-litigation case to retain jurisdiction over the case for trial. The transferee court may also retain jurisdiction to determine compensatory and punitive damages.

- H.R. 2134 - *Bail Bond Fairness Act of 2003*
  • Introduced by: Keller
  • Date Introduced: 5/15/03
  • Status: Referred to the House Committee on the Judiciary (5/15/03). Referred to the Subcommittee on Crime, Terrorism, and Homeland Security (6/25/03). House Judiciary Committee favorably reported by acclamation (9/10/03) (Committee also voted to delete finding 5 in Section 2(a)(5) by a voice vote. That finding iterated that "[i]n the absence of a meaningful bail bond option, thousands of defendants in the Federal system fail to show up for court appearances every year"). Reported by the House Judiciary Committee H. Rept. 108-316 (10/15/03). Placed on Union Calendar (10/15/03).
  • Related Bills: None.
  • Key Provisions:

— Section 3 ostensibly amends, among other things, **Criminal Rule 46(f)(1)** by providing that the district court declare bail forfeited only when the defendant fails to physically appear before the court. (The existing rule provides that the court declare bail forfeited if a condition of the bond is breached.)

- H.R. 2242 - *Tribal Government Amendments to the Homeland Security Act*
  • Introduced by: Kennedy
  • Date Introduced: 5/22/03
  • Status: Referred to the House Committees on Resources, Judiciary, Budget, Intelligence, Homeland Security (5/22/03). Referred to House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (6/25/03).
  • Related Bills: S.578
  • Key Provisions:

— Section 12 amends, inter alia, **Criminal Rule 6(e)(3)(C)** by replacing "federal, state . . . " with "Federal, State, tribal . . .."

- H.R. 3037 - *Antiterrorism Tools Enhancement Act of 2003*
  • Introduced by: Feeney

• Date Introduced: 9/9/03
• Status: Referred to the House Committee on the Judiciary (9/9/03). Referred to the House Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security (10/22/03).
• Related Bills: None.
• Key Provisions:

— Section 2 amends **Criminal Rule 41(b)(3)** by providing that a magistrate judge in a district where an act of terrorism has occurred may issue a warrant for a person or property within or without that district.

- H.R. 3214 - *Advancing Justice Through DNA Technology Act of 2003*
  • Introduced by: Sensenbrenner
  • Date Introduced: 10/1/03
  • Status: Referred to the House Committees on the Judiciary and Armed Services (10/1/03). Referred to the House Judiciary's Subcommittee on Crime, Terrorism, and Homeland Security (10/2/03). Subcommittee on Crime, Terrorism, and Homeland Security discharged (10/6/03). Judiciary Committee held mark-up session and ordered reported by a vote of 28-1 (10/8/03). House Report 108-321 filed (10/16/03). House Committee on Armed Services discharged (10/16/03). Placed on Union Calendar (10/16/03). House voted to suspend the rules and pass bill by a vote of 357-67 (11/5/03). Received in the Senate (11/6/03). Read twice and referred to the Senate Judiciary Committee (12/9/03).
  • Related Bills: S. 1700.
  • Key Provisions:

— Section 311 amends **Part II of Title 18, U.S.C.,** by adding a new chapter 228A regarding post-conviction DNA testing. Under new section 3600(g)(1), the statute would provide that an inmate whose DNA test results excludes him or her "as the source of the DNA evidence," may file a motion for new trial or resentencing notwithstanding any rule or law that would bar such a motion as untimely.

- H.R. 3381 - *Crime Victims Assistance Act of 2003*
  • Introduced by: Norton
  • Date Introduced: 10/28/03
  • Status: Referred to the House Committees on the Judiciary, Budget, and Rules (10/28/03). Referred to the Committee's Subcommittee on Crime, Terrorism, and Homeland Security (12/10/03).
  • Related Bills: S.J. Res. 1, H.J. Res. 10, H.J. Res. 48.
  • Key Provisions:

— Section 103 amends **Criminal Rule 11** by adding a new subdivision that provides that the court should not enter judgment on a defendant's guilty plea before asking the prosecutor whether the victim (or any other person whose safety, by relationship to the victim, may be reasonably threatened) has been consulted on the defendant's plea. Section 103 also directs the Judicial Conference to report to

the Congress, within 180 days after enactment of the act, recommending amendments to the Federal Rules of Criminal Procedure to provide enhanced opportunities for victims and others to be heard on whether or not the court should accept a guilty or nolo contendere plea from the defendant.

— Section 105 amends **Criminal Rule 32** by eliminating the restriction that only victims of violent crimes or sexual abuse at sentencing may be heard at sentencing. Section 105 also directs the Judicial Conference to report to the Congress, within 180 days after enactment of the act, recommending amendments to the Federal Rules of Criminal Procedure to provide enhanced opportunities for victims to participate during the presentencing and sentencing phases.

● H.R. 4342 - *Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*

• Introduced by: Chabot
• Date Introduced: 5/12/04
• Status: Referred to the House Judiciary Committee (5/12/04).
• Related Bills: S. 2329, S.J. Res. 1, H.J. Res. 10, H.J. Res. 48
• Key Provisions:

— Section 2 amends **Title 18 of the United States Code** by adding a new chapter on the rights of crime victims. The bill provides that a crime victim (defined as a person directly and proximately harmed as a result of the commission of a federal offense) has a number of rights such as the right to be protected from the accused, the right to reasonable notice of any public proceeding involving the crime or release/escape of the accused, and the right to be heard at any public proceeding involving release, plea, or sentencing. Section 2 also sets forth enforcement measures available to the crime victims.

— Section 4 directs the Administrative Office to report to Congress the number of times that a crime victim was denied rights under the legislation, and the reason for such denial.

SENATE RESOLUTIONS

● S.J. Res. 1 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

• Introduced by: Kyl
• Date Introduced: 1/7/03.
• Status: Referred to the Senate Committee on the Judiciary (1/7/03). Judiciary Committee held hearing (4/8/03). Referred to House Judiciary Committee's Subcommittee on Constitution, Civil Rights, and Property Rights (6/10/03). Subcommittee on Constitution approved without amendment by a vote of 5-4 (6/12/03). Markup sessions held (7/24/03 and 7/31/03). Senate Judiciary Committee reported favorably without amendment and written report (9/4/03). Placed on Senate Calendar (9/4/03). Report No. 108-191 filed (11/7/03).
• Related Bills: H.J. Res. 10, H.J. Res. 48

• Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

HOUSE RESOLUTIONS

● H.J. Res. 10 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

• Introduced by: Royce
• Date Introduced: 1/7/03.
• Status: Referred to the House Committee on the Judiciary (1/7/03).
• Related Bills: S.J. Res. 1, H.J. Res. 48
• Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated by public safety, compelling necessity, or the administration of justice.

● H.J. Res. 48 - *Proposing an Amendment to the Constitution of the United States to Protect the Rights of Crime Victims*

• Introduced by: Chabot
• Date Introduced: 4/10/03.
• Status: Referred to the House Committee on the Judiciary (4/10/03). Referred to the Subcommittee on the Constitution (5/5/2003). Subcommittee held hearing (9/30/03).
• Related Bills: S.J. Res. 1, H.J. Res. 10
• Key Provisions:

— Section 2 provides that a victim of a violent crime shall have the constitutional right to (1) reasonable and timely notice of any public proceeding involving the crime and any release or escape of the accused; (2) appear at such proceedings and to be heard on matters such as the release, plea, sentencing, reprieve, and pardon of the accused; and (3) adjudicative decisions that consider the victim's safety, interest in avoiding unnecessary delay, and interest in fair and timely claims to restitution from the accused. These rights shall not be restricted except as dictated

by public safety, compelling necessity, or the administration of justice.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K. RABIEJ
Chief

Rules Committee Support Office

WASHINGTON, D.C. 20544

May 19, 2004

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the office to improve its support service to the rules committees.

Automation Project (Documentum)

Our web-based electronic document-management system (Documentum) continues to work well. We are using Documentum to file, review, and edit all rules documents, process comments and suggestions, prepare acknowledgment letters, organize and search for documents using enhanced indexing and search capabilities, expedite intake and processing of e-mails and attachments, and track different versions of documents to ensure the quality and accuracy of work products.

In February, we began moving to the latest version of the software — Documentum 5. Staff is working to customize the software, and we hope to add the following enhancements to the system: remote access to the database by committee members, reporters, and staff; improved search and retrieval capability; distributing agenda books in electronic form; and "redlining" software. Funding for the enhancements, however, continues to be an issue because of budget constraints.

Internet

We recently completed a long-range project to build a reference collection of primary rules-related records on the Judiciary's Federal Rulemaking Internet web site <http://www.uscourts.gov/rules>. We posted on the web site all rules committees' reports (Standing and Advisory Rules Committees) from 1992/3 to present. (See attached.) Together with rules committees' minutes dating back to 1992, we now have on the web site a core collection of rules records for the past 12 years. This will allow a person to research the "legislative history" of rules amendments considered during the last decade. In addition, to make searching the web site easier and faster, we have added a new search engine to the site that "highlights" the search terms in the documents retrieved. The web site continues to be well used, with a total of 26,404 "visits" to the site during April 2004, an average of 880 visits per day.

Committee and Subcommittee Meetings

For the period from December 10, 2003, through May 12, 2004, the office staffed ten meetings, including one Standing Committee meeting, five advisory rules committee meetings, two subcommittee meetings, a meeting of the Informal Working Group on Mass Torts, and a conference on electronic discovery. The office has also arranged and participated in numerous conference calls involving rules subcommittees.

The docket sheets of all suggested amendments for Bankruptcy, Civil, Criminal, and Evidence Rules have been updated to reflect the rules committees' recent respective actions. Every suggested amendment along with its source, status, and disposition is listed. The docket sheets are updated after each committee meeting, and they are included in each agenda book. The docket sheets are also posted on our web site.

The office continues to research our historical records for information regarding any past relevant committee action on every new proposed amendment submitted to an advisory committee. Pertinent documents were forwarded to the appropriate reporter for consideration.

Record Keeping

Under the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*, all rules-related records must "be maintained at the Administrative Office of the United States Courts for a minimum of two years and . . . [t]hereafter the records may be transferred to a government record center . . . ."

All rules-related records from 1935 through 1996 have been entered on microfiche and indexed. The records from 1997 to the present will also be stored on microfiche eventually. The microfiche collection continues to prove useful to us and the public in researching prior committee positions. In addition, many of these records are filed in Documentum. With the use of a high-capacity scanner, staff is now inputting rules-related records timely into Documentum.

Manual Tracking

For the recent public-comment period, the office received, acknowledged, forwarded, and followed up on approximately 543 comments, the great majority of which were on proposed new Appellate Rule 32.1 on "unpublished" opinions. Because the comments were voluminous, we copied them onto a compact disk and distributed the disks to the Appellate Rules Committee members. We found that this new procedure allowed us to distribute the comments much faster and more cheaply. We will continue to distribute the comments electronically using Adobe PDF, with a follow-up mailing of a complete set of all comments received.

State Bar Points-of-Contact

In August 1994, the president of each state bar association was requested to designate a point-of-contact for the rules committee to solicit and coordinate that state bar's comments on the proposed amendments. The Standing Committee outreach to the organized bar has resulted in 53 state bars designating a point-of-contact.

The points-of-contact list was updated in time to include the new names in *The Request for Comment* pamphlet on proposed amendments published in August 2003. Several state bars updated their designated point-of-contact. The process is being repeated every year to ensure that we have an accurate and up-to-date list.

Miscellaneous

In April 2004, the Supreme Court approved proposed amendments to the Federal Rules of Bankruptcy and Criminal Procedure (including amendments to the Rules Governing Section 2254 Cases in the United States District Court and accompanying form, and the Rules Governing Section 2255 Cases in the United States District Court and accompanying form) that were approved by the Judicial Conference at its September 2003 session. The amendments were transmitted to Congress and will become effective on December 1, 2004, unless Congress enacts legislation to reject, modify, or defer the amendments.

The office participated in a televised program presented by the Office of Judges Programs titled, ***"The Office of Judges Programs and the Federal Rules Process."*** The program—which was broadcast on the Federal Judicial Television Network in April and May 2004—features Judges Levi, Carnes, Rosenthal, Small, and Administrative Office staff and examines the federal rulemaking process and how the Office of Judges Programs and Rules Committee Support Office assist the process.

James N. Ishida

Attachments

Federal Rulemaking

- Proposed Rules Amendments Published for Comment
- Pending Rules Amendments Awaiting Final Action
- Meetings and Hearings
- Rules and Forms in Effect
- Local Court Rules
- The Rulemaking Process
- Dockets, Minutes, & Reports
- Past Rules Amendments
- Legislation
- Publications
- Contact Rules Support
- Federal Rulemaking Home

Federal Rulemaking

Dockets, Minutes, & Reports

Reports of Rules Committees

Committee on Rules of Practice and Procedure

- March 2004
- September 2003
- March 2003
- September 2002
- March 2002
- September 2001
- March 2001
- September 2000
- March 2000
- September 1999
- March 1999
- September 1998
- March 1998
- September 1997
- March 1997
- September 1996
- March 1996
- September 1995
- March 1995
- September 1994

Advisory Committee on Rules of Civil Procedure

- December 2003
- May 2003
- December 2002
- May 2002
- December 2001
- May 2001
- December 2000
- May 2000
- December 1999
- May 1999
- December 1998
- May 1998
- December 1997
- May 1997
- December 1996
- May 1996
- December 1995
- June 1995
- December 1994
- May 1994

- March 1994
- September 1993
- March 1993
- December 1993
- May 1993
- November 1992
- May 1992

Advisory Committee on Rules of Appellate Procedure

- December 2003
- May 2003
- December 2002
- May 2002
- November 2001
- May 2001
- November 2000
- May 2000
- December 1999
- May 1999
- December 1998
- May 1998
- November 1997
- May 1997
- December 1996
- June 1996
- December 1995
- June 1995
- December 1994
- May 1994
- December 1993
- May 1993
- December 1992
- June 1992

Advisory Committee on Rules of Criminal Procedure

- December 2003
- May 2003
- December 2002
- May 2002
- December 2001
- May 2001
- May 2000
- December 1999
- May 1999
- December 1998
- May 1998
- December 1997
- May 1997
- December 1996
- May 1996
- December 1995
- May 1995
- November 1994
- May 1994
- December 1993
- May 1993
- November 1992
- May 1992

Advisory Committee on Rules of Bankruptcy Procedure

Advisory Committee on Rules of Evidence

- December 2003
- May 2003
- December 2002
- May 2002
- December 2001
- May 2001
- November 2000
- May 2000
- December 1999
- May 1999
- December 1998
- May 1998
- December 1997
- May 1997
- December 1996
- May 1996
- December 1995
- June 1995
- December 1994
- May 1994
- December 1993
- May 1993
- November 1992
- May 1992

- December 2003
- May 2003
- December 2002
- May 2002
- December 2001
- May 2001
- December 2000
- May 2000
- December 1999
- May 1999
- December 1998
- May 1998
- December 1997
- May 1997
- December 1996
- May 1996
- June 1995
- November 1994
- May 1994
- December 1993
- May 1993

Federal Rulemaking

- Proposed Rules Amendments Published for Comment
- Pending Rules Amendments Awaiting Final Action
- Meetings and Hearings
- Rules and Forms in Effect
- Local Court Rules
- The Rulemaking Process
- Dockets, Minutes, & Reports
- Past Rules Amendments
- Legislation
- Publications
- Contact Rules Support
- Federal Rulemaking Home

Federal Rulemaking

Dockets, Minutes, & Reports

Minutes of Committee Meetings

Committee on Rules of Practice and Procedure

- June 2003
- January 2003
- June 2002
- January 2002
- June 2001
- January 2001
- June 2000
- January 2000
- June 1999
- January 1999
- June 1998
- January 1998
- June 1997
- January 1997
- June 1996
- January 1996
- July 1995
- January 1995
- June 1994
- January 1994

Advisory Committee on Rules of Civil Procedure

- October 2003
- May 2003
- October 2002
- May 2002
- January 2002
- October 2001
- April 2001
- March 2001
- October 2000
- April 2000
- October 1999
- April 1999
- November 1998
- March 1998
- October 1997
- May 1997
- March 1997
- October 1996
- April 1996
- November 1995

- June 1993
- December 1992

- April 1995
- February 1995
- October 1994
- April 1994
- February 1994
- October 1993

Advisory Committee on Rules of Appellate Procedure

- November 2003
- May 2003
- November 2002
- April 2002
- April 2001
- April 2000
- October 1999
- April 1999
- October 1998
- April 1998
- September 1997
- April 1997
- April 1996
- October 1995
- April 1995
- October 1994
- April 1994
- September 1993

Advisory Committee on Rules of Criminal Procedure

- April 2003
- September 2002
- April 2002
- April 2001
- October 2000
- April 2000
- January 2000
- October 1999
- June 1999
- April 1999
- October 1998
- April 1998
- October 1997
- April 1997
- October 1996
- April 1996
- October 1995
- April 1995
- October 1994
- April 1994
- October 1993
- April 1993
- October 1992

Advisory Committee on Rules of Bankruptcy Procedure

- September 2003
- April 2003
- October 2002
- March 2002
- March 2001
- September 2000
- March 2000
- September 1999
- March 1999
- October 1998
- March 1998
- September 1997
- March 1997
- September 1996
- March 1996
- September 1995
- March 1995
- December 1994
- September 1994
- February 1994
- September 1993

Advisory Committee on Rules of Evidence

- November 2003
- April 2003
- October 2002
- April 2002
- April 2001
- April 2000
- October 1999
- April 1999
- October 1998
- April 1998
- October 1997
- April 1997
- November 1996
- January 1995
- April 1996
- May 1995
- October 1994
- May 1994
- September 1993

BANKRUPTCY RULES SUGGESTIONS DOCKET

(By Rule Number)

ADVISORY COMMITTEE ON BANKRUPTCY RULES

The docket sets forth suggested changes to the Federal Rules of Bankruptcy Procedure considered by the Advisory Committee since 1997. The suggestions are set forth in order by: (1) bankruptcy rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Suggestion	Docket No., Source & Date	Status
	BANKRUPTCY RULES	
Rule 2002(g) Allow entity to designate address for purpose of receiving notices.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/4/02 00-BK-A Raymond P. Bell, Esq., Fleet Credit Card Services, L.P. 1/18/00	2/02 - Referred to chair and reporter 3/02 - Committee considered 4/03 - Committee considered 9/03 - Committee considered and approved in principle 3/04 - Committee approved for publication **PENDING FURTHER ACTION**
Rule 2003 Clarify debtor's obligation to provide substantiating documents	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee approved for publication **PENDING FURTHER ACTION**

Rule 2016 Require debtor's attorney to disclose details of professional relationship with debtor	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee considered and deferred action **PENDING FURTHER ACTION**
Rule 3002(c) Provide exception for Chapters 7 and 13 corporate cases where debtor not an individual.	01-BK-F Judge Paul Mannes 6/23/00	6/00 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 3017.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 4002 Clarify debtor's obligation to provide substantiating documents	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee approved for publication **PENDING FURTHER ACTION**

Rule 4003 Impose burden of proof upon the debtor.	01-BK-D Judge Barry Russell 4/4/01	4/01 - Referred to chair and reporter 3/02 - Committee considered and deferred decision 9/03 - Committee considered and took no action but continues to monitor case law **PENDING FURTHER ACTION**
Rule 4003(b) Allow retroactive extension of deadline, and provide that secured creditors may object to exemption claim.	04-BK-B Judge Eugene R. Wedoff 2/17/04	3/04 - Sent to chair and reporter **PENDING FURTHER ACTION**
Rule 4008 Provide a deadline for filing reaffirmation agreement.	01-BK-E Francis F. Szczebak, Esq., for the BK Judges Advisory Group 11/30/01	1/02 - Referred to chair and reporter 3/02 - Committee considered and deferred decision. Referred to subcommittee. 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment 3/04 - Committee approved **PENDING FURTHER ACTION**
Rule 5005(c) Add Clerk of the Bankruptcy Appellate Panel to entities already listed.	03-BK-B Judge Robert J. Kressel 7/2/03	7/03 - Referred to chair and reporter 9/03 - Committee considered and approved for publication 1/04 - Standing Committee approved for publication **PENDING FURTHER ACTION**
Rule 6007(a) Require the trustee to give notice of specific property he intends to abandon.	99-BK-I Physa Griffith South, Esq. 10/13/99	12/99 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**

Rule 7001 Dispense with requirement of filing adversarial complaint in certain circumstances	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee considered and referred to Attorney Conduct Subcommittee **PENDING FURTHER ACTION**
Rule 7023.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7026 Eliminate mandatory disclosure of information in adversary proceedings.	00-BK-008 01-BK-A Jay L. Welford, Esq.and Judith G. Miller, Esq., for the Commercial Law League of America 1/26/01 00-BK-009 01-BK-B Judy B. Calton, Esq. 1/12/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 9011 Make grammatical correction.	97-BK-D John J. Dilenschneider, Esq. 5/30/97	6/97 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**

Rule 9036 State that notice by electronic means is complete upon transmission.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/1/02	2/02 - Referred to reporter, chair and committee 9/03 - Committee considered and approved in principle 1/04 - Standing Committee approved for publication **PENDING FURTHER ACTION**
	BANKRUPTCY FORMS	
Official Form 1 Amend Exhibit C to the Voluntary Petition.	02-BK-D Gregory B. Jones, Esq. 2/7/02	2/02 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Schedule I Amend to make applicable in Chapter 7 and 11 proceedings	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and approved for publication **PENDING FURTHER ACTION**
Official Form 9 Direct that information regarding bankruptcy fraud and abuse be sent to the United States trustee.	97-BK-B US Trustee Marcy J.K. Tiffany 3/6/97	3/97 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Official Form B9C Provide less confusing notice of commencement of bankruptcy form to debtors and creditors.	00-BK-E Ali Elahinejad 2/23/00	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Official Form B10 Amend Proof of Claim form.	04-BK-A Glen K. Palman 2/19/04	3/04 - Referred to reporter, chair, and Subcommittee on Forms **PENDING FURTHER ACTION**
	SUBJECT MATTER	

Fraud Amend the rules to protect creditors from fraudulent bankruptcy claims and the mishandling of cases by trustees.	02-BK-B Dr. & Mrs. Glen Dupree 2/4/02	2/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
New Rule Incorporate proposed Civil Rule 5.1 in the bankruptcy rules.	03-BK-F Judge Geraldine Mund 10/14/03	10/03 - Referred to reporter and chair 3/04 - Committee considered and approved **PENDING FURTHER ACTION**
Small Claims Procedure Establish a "small claims" procedure.	00-BK-D Judge Paul Mannes 3/13/00 (see also 98-BK-A)	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Social Security Number Allow credit reporting agencies to have access to debtor's full social security number.	03-BK-E Experian (Janet Slane, Director, Product Infrastructure) 10/07/03	10/03 - Referred to reporter and chair **PENDING FURTHER ACTION**

CIVIL RULES SUGGESTIONS DOCKET

ADVISORY COMMITTEE ON CIVIL RULES

The docket sets forth suggested changes to the Federal Rules of Civil Procedure considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) civil rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

[illegible] CIVIL RULES	[illegible]	[illegible]
Rule 4(c)(1) Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 - Committee deferred as premature **DEFERRED INDEFINITELY**
Rule 4(d) To clarify waiver-of-service provision	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 4(m) Extends time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 - Committee considered **DEFERRED INDEFINITELY**
Rule 4 Permit electronic service of process on persons/entities located in the US	03-CV-F Jeremy A. Colby 8/26/03	9/03 - Sent to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 4 To provide for sanctions against the willful evasion of service	97-CV-K Judge Joan Humphrey Lefkow 8/12/97	10/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended accumulation for periodic revision **PENDING FURTHER ACTION**
Rule 5 Clarifies that a document is deemed filed upon delivery to an established courier	00-CV-C Lawrence A. Salibra, Senior Counsel 6/5/00	6/00 - Referred to chair, reporter, and agenda subcommittee **PENDING FURTHER ACTION**
Rule 5(b)(2)(D) Treat electronic mail or facsimile the same as hand delivery	04-CV-A David R. Fine, Esq. 1/2/04	1/04 - Referred to chair and reporter **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source and Date	Status
Rule 5(d) Does non-filing of discovery material affect privilege	Standing Committee 6/99	10/99 - Committee considered **PENDING FURTHER ACTION**
New Rule 5.1 Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action	00-CV-G Judge Barbara B. Crabb 10/5/00	10/00 - Referred to reporter and chair 1/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered **PENDING FURTHER ACTION**
Rule 6 Clarifies when three calendar days are added to deadline when service is by mail	00-CV-H Roy H. Wepner, Esq. (via Appellate Rules Committee) 11/27/00	12/00 - Referred to reporter and chair 5/02 - Committee considered 10/02 - Committee considered 5/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and approved **PENDING FURTHER ACTION**
Rule 6 Time Issues	03-CV-C Irwin H. Warren, Esquire 6/26/03	6/03 - Referred to reporter and chair 4/04 - Committee considered and approved **PENDING FURTHER ACTION**
Rule 6(e) Clarify the method for extending time to respond after service	Appellate Rules Committee 4/02	4/02 - Referred to Committee 10/02 - Committee considered 5/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee considered and approved **PENDING FURTHER ACTION**
Rule 6(e) Treat electronic mail or facsimile the same as hand delivery	04-CV-A David R. Fine, Esq. 1/2/04	1/04 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 8(a)(2) Require "short and plain statement of the claim" that allege facts sufficient to establish a *prima* facie case in employment discrimination	02-CV-E Nancy J. Smith, Esq. 6/17/02	6/02 - Referred to reporter and chair **PENDING FURTHER ACTION**

Suggestion	Docket No. / Submitted by / Date	Status
Rule 8(c) In restyling the civil rules: delete "discharge in bankruptcy"; and insert "claim preclusion" and "issue preclusion"	04-CV-E Judge Christopher M. Klein 3/30/04	4/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12 To conform to *Prison Litigation Act of 1996* that allows a defendant sued by a prisoner to waive right to reply	97-CV-R John J. McCarthy 11/21/97	12/97 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee considered 4/99 - Committee considered and deferred action **DEFERRED INDEFINITELY**
Rule 12(f) Provide guidance for the clerk when the court strikes a pleading	02-CV-J Judge D. Brock Hornby 10/02	10/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 15(a) Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 - Committee considered 11/95 - Committee considered and deferred **DEFERRED INDEFINITELY**
Rule 15(c)(3)(B) Clarifying extent of knowledge required in identifying a party	98-CV-E Charles E. Frayer, Law student 9/27/98	9/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee rec. accumulate for periodic revision (1) 4/99 - Committee considered and retained for future study 5/02 - Committee considered along with J. Becker suggestion in 266 F.3d 186 (3rd Cir. 2001). 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 15(c)(3)(B) Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3rd Cir. 2001)	10/01 - Referred to chair and reporter 1/02 - Committee considered 5/02 - Committee considered 10/02 - Committee referred to subcommittee for further consideration 10/03 - Committee considered **PENDING FURTHER ACTION**

Suggestion	Docket Number, Starting Point, Date	Status
Rule 23 Revise to protect the status of the small defendant	03-CV-D William S. Karn 7/31/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 26 Interviewing former employees of a party	John Goetz	4/94 - Declined to act **DEFERRED INDEFINITELY**
Rule 26 Does inadvertent disclosure during discovery waive privilege	Discovery Subcommittee	10/99 - Discussed **PENDING FURTHER ACTION**
Rule 26 Electronic discovery		10/99 - Referred to Discovery Subcommittee 3/00 - Discovery Subcommittee considered 4/00 - Committee considered 10/00 - Committee considered 4/01 - Committee considered 5/02 - Committee considered 10/02 - Committee and Discovery Subcommittee considered 5/03 - Committee considered Discovery Subcommittee's report 2/04 - Committee presented E-Discovery Conference at Fordham Law School in New York 4/04 - Committee considered and approved subcommittee's recommendation to publish for public comment **PENDING FURTHER ACTION**
Rule 26 Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	00-CV-E Gregory K. Arenson, Chair, NY State Bar Association Committee on Federal Procedure 8/7/00	8/00 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 26(a) To clarify and expand the scope of disclosure regarding expert witnesses	00-CV-I Prof. Stephen D. Easton 11/29/00	12/00 - Referred to reporter and chair **PENDING FURTHER ACTION**

Rule 30(b) Give notice to deponent that deposition will be videotaped	99-CV-J Judge Janice M. Stewart 12/8/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Discovery Subcommittee 4/00 - Referred to Discovery Subcommittee 8/03 - Committee published proposed amendments to Civil Rule 45 re notifying witness of the manner of recording the deposition 4/04 - Committee approved **PENDING FURTHER ACTION**
Rule 30(b)(6) Myriad proposed amendments	04-CV-B New York State Bar Association Commercial and Federal Litigation Section (Gregory K. Arenson, Esq., Chair) 2/24/04	3/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 32 Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 Referred to chair and reporter 10/96 - Committee considered. Federal Judicial Center to conduct study 5/97 - Reporter recommended that it be considered part of discovery project 3/99 - Agenda Subcommittee recommended referral to other committee **PENDING FURTHER ACTION**
Rules 33 & 34 Require submission of a floppy disc version of document	99-CV-E Jeffrey K. Yencho 7/22/99	7/99 - Referred to Agenda Subcommittee 8/99 - Agenda Subcommittee recommended referral to other Subcommittee **PENDING FURTHER ACTION**
Rule 40 Precedence given elderly in trial setting	00-CV-A Michael Schaefer 1/19/00	2/00 - Referred to chair, reporter, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 50(b) Eliminate the requirement that a motion for judgment be made "at the close of all the evidence" as a prerequisite for making a post-verdict motion, if a motion for judgment had been made earlier	03-CV-A New York State Bar Association Committee on Federal Procedure of the Commercial and Federal Litigation Section 2/25/03	3/03 - Referred to chair and reporter 5/03 - Committee considered 10/03 - Committee considered 4/04 - Committee approved for publication **PENDING FURTHER ACTION**

Rule 50(b) When a motion is timely after a mistrial has been declared	97-CV-M Judge Alicemarie Stotler 8/26/97	8 /97 - Referred to chair and reporter 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 54(b) Define "interlocutory order"	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 56 To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 56(a) Clarification of timing	97-CV-B Scott Cagan 2/27/97	3/97 - Referred to reporter, chair, and Agenda Subcommittee 5/97 - Reporter recommended no action 3/99 - Agenda Subcommittee to accumulate for periodic revision **PENDING FURTHER ACTION**
Rule 56(c) Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 - Committee considered 11/95 - Committee considered 3/99 - Agenda Subcommittee to accumulate for periodic revision 1/02 - Committee considered and set for further discussion **PENDING FURTHER ACTION**
Rule 62.1 Proposed new rule governing "Indicative Rulings"	Appellate Rules Committee 4/01	1/02 - Committee considered 5/03 - Committee considered 10/03 - Committee considered **PENDING FURTHER ACTION**
Rule 68 Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	96-CV-C Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903	1/93 - Unofficial solicitation of public comment 5/93 - Committee considered 10/93 - Committee considered 4/94 - Committee considered. Federal Judicial Center to study rule 10/94 - Committee deferred for further study 1995 - Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 - Referred to reporter, chair, and Agenda Subcommittee (Advised of past comprehensive study of proposal) 1/97 - S. 79 introduced. § 303 would amend the rule 4/97 - Stotler letter to Hatch

	02-CV-D Gregory K. Arenson 4/19/02	5/97 - Reporter recommended continued monitoring 3/99 - Agenda Subcommittee recommended removal from agenda 10/99 - Consent calendar removed from agenda **COMPLETED** 5/02 - Referred to reporter and chair 10/02 - Committee considered and agreed to carry forward suggestion **PENDING FURTHER ACTION**
Rule 72(a) State more clearly the authority for reconsidering an interlocutory order	03-CV-E Craig C. Reilly, Esq. 8/6/03	8/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 81 To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 - Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
Rule 81(c) Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 - Accumulate other technical changes and submit eventually to Congress 11/95 - Reiterated April 1995 decision 5/97 - Reporter recommended that it be included in next technical amendment package 3/99 - Agenda Subcommittee to accumulate for periodic revision 4/99 - Committee considered **PENDING FURTHER ACTION**
Rule 83(a)(1) Uniform effective date for local rules and transmission to AO		3/98 - Committee considered 11/98 - Committee considered 3/99 - Agenda Subcommittee recommends referral to other Committee (3) 4/00 - Committee considered **DEFERRED INDEFINITELY**
Rule 83 Have a uniform rule making Federal Rules of Civil Procedure consistent with Federal Rules of Appellate Procedure with respect to attorney admission	02-CV-H Frank Amador, Esq. 9/19/02	9/02 - Referred to reporter and chair **PENDING FURTHER ACTION**
	FORMS	

CV Form 1 Standard form AO 440 should be consistent with summons Form 1	98-CV-F Joseph W. Skupniewitz, Clerk 10/2/98	10/98 - Referred to chair, reporter, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended full Committee consideration **PENDING FURTHER ACTION**
CV Form 17 Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 - Referred to Committee 3/99 - Agenda Subcommittee recommends full Committee consideration 4/99 - Committee deferred for further study **PENDING FURTHER ACTION**
CV Forms 31 and 32 Delete the phrase, "that the action be dismissed on the merits" as erroneous and confusing	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to chair and reporter 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**
AO Forms 241 and 242 Amend to conform to changes under the Antiterrorism and Effective Death Penalty Act of 1997	98-CV-D Judge Harvey E. Schlesinger 8/10/98	8/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommends referral to other Committee **PENDING FURTHER ACTION**
Admiralty Rule B Clarify Rule B by establishing the time for determining when the defendant is found in the district	01-CV-B William R. Dorsey, III, Esq., President, The Maritime Law Association	6/00 - Referred to reporter, chair, and Mark Kasanin 11/01 - Committee considered 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment 4/04 - Committee approved **PENDING FURTHER ACTION**
New Admiralty Rule Authorize immediate posting of preemptive bond to prevent vessel seizure	96-CV-D Magistrate Judge Roberts 9/30/96 #1450	12/96 - Referred to Admiralty and Agenda Subcommittee 3/99 - Agenda Subcommittee deferred action until more information available 5/02 - Committee discussed new rule governing civil forfeiture practice 5/03 - Committee considered new Admiralty Rule G 4/04 - Committee approved for publication **PENDING FURTHER ACTION**

Admiralty Rule C(4) Amend to satisfy constitutional concerns regarding default in actions *in rem*	97-CV-V Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97	1/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee recommended deferral until more information available **PENDING FURTHER ACTION**
Court filing fee AO regulations on court filing fees should not be effective until adoption in the FRCP or Local Rules of Court	02-CV-C James A. Andrews 4/1/02, 5/13/02	4/02 - Referred to reporter and chair 6/02 - Referred second letter to reporter and chair **PENDING FURTHER ACTION**
***De Bene Esse* Depositions** Provide specifically for *de bene esse* depositions	02-CV-G Judge Joseph E. Irenas 6/7/02	7/02 - Referred to reporter and chair 10/02 - Solicited input from Evidence Rules Committee **PENDING FURTHER ACTION**
Discovery Rules Return to them as they were before the 1993 amendments	04-CV-D Judge Wm. R. Wilson, Jr. 2/9/04	3/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Electronic Filing To require clerk's office to date stamp and return papers filed with the court.	99-CV-I John Edward Schomaker, prisoner 11/25/99	12/99 - Referred to reporter, chair, Agenda Subcommittee, and Technology Subcommittee **PENDING FURTHER ACTION**
Interrogatories on Disk	98-CV-C Michelle Ritz 5/13/98 See also 99-CV-E: Jeffrey Yencho suggestion re: Rules 3 and 34	5/98 - Referred to reporter, chair, and Agenda Subcommittee 3/99 - Agenda Subcommittee received and referred to other Committee **PENDING FURTHER ACTION**
Plain English Make the language understandable to all	02-CV-I Conan L. Hom, law student 10/2/02	10/02 - Referred to reporter and chair 5/03 - Committee considered and approved restyled Civil Rules 1-15 6/03 - Standing Committee approved for publication. Publication to be deferred. 10/03 - Committee considered and approved for publication restyle Civil Rules 16-25 and 26-37 and 45 4/04 - Committee approved for publication restyle Civil Rules 38-63 **PENDING FURTHER ACTION**
Postal Bar Codes Prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes	00-CV-D Tom Scherer 3/2/00	7/00 - Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, Date	Status
Pro Se Litigants To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	97-CV-I Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Committee, to support proposal by Judge David Piester 7/17/97	7/97 - Referred to reporter and chair 10/97 - Referred to Agenda Subcommittee 3/99 - Agenda Subcommittee received schedule for further study **PENDING FURTHER ACTION**
Require less than unanimous verdicts	04-CV-F Judge James T. Trimble, Jr. 4/1/04	4/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Simplified Procedures Establish federal small claims procedures	Judge Niemeyer 10/00	10/99 - Committee considered, Subcommittee appointed 4/00 - Committee considered 10/00 - Committee considered **PENDING FURTHER ACTION**
Word Substitution Substitute term "action" for "case" and other similar words; substitute term "averment" for "allegation" and other similar words	02-CV-F Prof. Bradley Scott Shannon 5/30/02	7/02 - Referred to reporter and chair 10/02 - Referred to Style Consultant **PENDING FURTHER ACTION**

CRIMINAL RULES DOCKET

ADVISORY COMMITTEE ON CRIMINAL RULES

The docket sets forth suggested changes to the Federal Rules of Criminal Procedure considered by the Advisory Committee since 1991. The suggestions are set forth in order by (1) criminal rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

	Docket Number, Source and Date	
	CRIMINAL RULES	
Rule 11 To direct a random number of plea-bargained cases be tried	03-CR-C Carl E. Person, Esq. 4/1/03	4/03 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 12.2(d) Sanction for defendant's failure to disclose results of mental examination	Roger Pauley 7/5/01	4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved **PENDING FURTHER ACTION**
Rule 29 Extension of time for filing motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved **PENDING FURTHER ACTION**
Rule 32(c)(3)(E) Provide for victim allocution in all felony cases	Professor Jayne Barnard	8/02 - Referred to chair and reporter 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 32.1(a)(5)(B)(i) Eliminate requirement that the government produce *certified* copies of the judgment, warrant, and warrant application	03-CR-B Judge Wm. F. Sanderson, Jr. 2/24/03	3/03 - Referred to reporter and chair 4/03 - Committee considered 10/03 - Committee considered and subcommittee formed 5/04 - Committee approved for publication **PENDING FURTHER ACTION**
Rule 32.1 Right of allocution before sentencing at revocation hearing	02-CR-D U.S. v. Frazier 2/25/02	3/02 - Referred to chair and reporter 4/02 - Committee considered 9/02 - Committee considered 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved **PENDING FURTHER ACTION**
Rule 33 Extension of time to file motion for new trial	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved **PENDING FURTHER ACTION**
Rule 34 Extension of time to file motion	02-CR-B Judge Paul L. Friedman 3/02	4/02 - Sent directly to chair and reporter 4/02 - Committee considered 9/02 - Committee deferred consideration until 4/03 meeting 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved **PENDING FURTHER ACTION**
Rule 40(a) Authorize magistrate judge to set new conditions of release	03-CR-A Magistrate Judge Robert B. Collings 1/03	1/03 - Referred to chair and reporter 10/03 - Committee considered and subcommittee formed 5/04 - Committee approved for publication **PENDING FURTHER ACTION**

Subject	Docket Number, Source and Date	Status
New Rule 59 To provide counterpart to Civil Rule 72	U.S. v. Abonce-Barerra 7/20/01	4/02 - Committee considered 9/02 - Committee approved proposed amendment in principle 4/03 - Committee considered and approved, with amendments, for publication 6/03 - Standing Committee approved for publication 8/03 - Published for public comment 5/04 - Committee approved **PENDING FURTHER ACTION**
SUBSTANTIVE		
28 U.S.C. § 2254 Rule 9(a) Revise rule so that it refers to a *claim* and not to the *petition*. *See Walker v. Crosby*, 341 F.3d 1240 (11th Cir. 2003)	03-CR-F Steven W. Allen 11/5/03	11/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Habeas Corpus Rule 8(c) Correct apparent mistakes in Rules Governing Section 2254 Cases and Section 2255 Proceedings	97-CR-F Judge Peter Dorsey 7/9/97	8/97 - Referred to chair and reporter 10/97 - Referred to Subcommittee 4/98 - Committee considered 10/98 - Committee considered 4/00 - Committee considered and approved for publication 6/00 - Standing Committee approved for publication 8/00 - Published for public comment 4/01 - Committee deferred pending further study 4/02 - Committee considered and approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved 4/04 - Supreme Court approved **PENDING FURTHER ACTION**
Model form for motions under 28 U.S.C. § 2255	00-CR-C Robert L. Byer, Esq. & David R. Fine, Esq. 8/11/00	8/00 - Referred to chair and reporter 4/02 - Committee approved 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved 4/04 - Supreme Court approved **PENDING FURTHER ACTION**

Restyle Habeas Corpus Rules		10/00 - Committee considered 1/01 - Standing Committee authorizes restyle project to proceed 4/02 - Committee approved for publication 6/02 - Standing Committee approved for publication 8/02 - Published for public comment 4/03 - Committee considered and approved, with amendments 6/03 - Standing Committee approved 9/03 - Judicial Conference approved 4/04 - Supreme Court approved **PENDING FURTHER ACTION**

EVIDENCE RULES DOCKET

ADVISORY COMMITTEE ON EVIDENCE RULES

The docket sets forth suggested changes to the Federal Rules of Evidence considered by the Advisory Committee since 1992. The suggestions are set forth in order by (1) evidence rule number, or (2) where there is no rule number, or several rules may be affected — alphabetically by subject matter.

Suggestion	Docket Number, Source, and Date	Status
Rule 301 Presumptions in General Civil Actions and Proceedings (applies to evidentiary presumptions but not substantive presumption.)		5/94 - Committee decided not to amend (comprehensive review) 6/94 - Standing Committee approved for publication 9/94 - Published for public comment 11/96 - Committee deferred until completion of project by Uniform Rules Committee **PENDING FURTHER ACTION**
Rule 404(a) Prohibit the circumstantial use of character evidence in civil cases		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication **PENDING FURTHER ACTION**
Rule 408 Compromise and Offers to Compromise		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication **PENDING FURTHER ACTION**

Suggestion	Docket Number, Source, and Date	Status
Rule 501 Privileges (codifies the federal law of privileges)		11/96 - Committee declined to take action 10/98 - Committee reconsidered and appointed a subcommittee to study the issue 4/99 - Committee deferred consideration pending further study 10/99 - Subcommittee appointed 4/00 - Committee considered subcommittee's proposals 4/01 - Committee considered subcommittee's proposals 4/02 - Committee considered consultant's "Survey of Privileges" 10/02 - Committee considered survey 4/03 - Committee considered survey 11/03 - Committee considered survey 4/04 - Committee considered survey **PENDING FURTHER ACTION**
Rule 606(b) To provide an exception for correcting errors in the rendering of the verdict		4/02 - Committee referred to reporter 10/02 - Committee considered 4/03 - Committee considered 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication **PENDING FURTHER ACTION**
Rule 609(a) Clarify types of crimes that qualify for mandatory admission under the rule		4/02 - Committee referred to reporter 11/03 - Committee considered and approved amendment in principle 4/04 - Committee approved for publication **PENDING FURTHER ACTION**
Rule 706 Court Appointed Experts (to accommodate some of the concerns expressed by the judges involved in the breast implant litigation, and to determine whether the rule should be amended to permit funding by the government in civil cases)		2/91 - Civil Rules Committee considered and deferred action 11/96 - Committee considered 4/97 - Committee considered and deferred action until CACM completes its study **PENDING FURTHER ACTION**
Rule 902(6) Extending applicability to news wire reports		10/98 - Committee considered 4/00 - Committee considered **PENDING FURTHER ACTION**
Rule 1001 Definitions (Cross references to automation changes)		10/97 - Committee considered **PENDING FURTHER ACTION**
SUBJECT MATTER		

Suggestion	Docket Number, Source, and Date	Status
[Admissibility of Videotaped Expert Testimony]		11/96 - Committee declined to take action but will continue to monitor rule 1/97 - Standing Committee considered **PENDING FURTHER ACTION**
[Automation] — To investigate whether the Evidence Rules should be amended to accommodate changes in automation and technology		11/96 - Committee considered 4/97 - Committee considered 4/98 - Committee considered 10/02 - Committee considered **PENDING FURTHER ACTION**

Agenda Item 4
Committee on Rules of
Practice and Procedure
June 2004
Informational

FEDERAL JUDICIAL CENTER UPDATE

The Federal Judicial Center provides this update on projects that may be related to Committee interests. The educational programs described below make up a small number of the seminars and in-court programs offered in person or electronically for judges and federal court staff. . The research projects described are a few of the projects undertaken by the Center, many in support of Judicial Conference committees.

I. Selected Educational Programs and Materials for Judges and Court Staff

A. Federal Judicial Television Network

The Center will present two editions of the Court-to-Court television magazine and a program on performance appraisals for all court staff. The Center released its third and fourth broadcasts concerning the monographs: supervising substance abusers was first broadcast in January and a May program discussed several districts' experiences implementing Monograph 109.

B. Center staff will work with our advisory committee of experienced district judges (and an *ex officio* member from the Sentencing Commission) to revise our *Benchbook for U.S. District Judges* to provide more information on the Statement of Reasons.

C. Other Educational Programs for Judges and Court Staff

Juror Management and Utilization Workshop for Small and Medium-sized Courts. In October, district court teams comprising judges, clerks of court, and jury administrators will meet to discuss strategies, current issues, and future trends and to develop local action plans to improve juror management

Technology Leadership Workshops. This new program will help unit executives and information technology managers plan and monitor automation projects, make procurement decisions, and hire and manage a diverse and geographically separated workforce. Teams from appellate and district courts and probation and pretrial services offices will be invited to a July workshop; an October workshop will be offered to bankruptcy court teams.

Managing a Capital Construction Project. An August AO-FJC collaborative workshop for court teams will discuss design terms, the design process, and the roles and responsibilities of the judiciary, GSA, and the architect or engineer.

Leadership Institute for chief deputy clerks and deputy chief probation and pretrial services officers. Due to the 100% oversubscription of the new March 2004 institute, the Center will offer a second program in December. Participants discuss change management, maximizing human resources, and identifying personal leadership strengths and areas for development.

Individual Development Plans for Staff Development. A new curriculum package will help managers and staff develops customized education plans that ensure each employee has the requisite skills to support the goals and objectives of the court unit. A September workshop will prepare approximately 60 court staff to deliver the program.

Staffing Adjustment Resource. The Center's new video-audio-print package, Managing the Human Impact of Downsizing, is now available to court managers on request. A series of audio conferences on the topic was conducted from March through April and the video component of the package was broadcast on the FJTN in June.

Book Reviews for Court Leaders. Six reviews, written by Center and court staff, have been posted on the Center's Web site to date; additional reviews are scheduled for the latter part of 2004. An editorial board of court unit executives helps the Center select books that are relevant, though not always obviously applicable, to the federal courts.

Orientation Web Site for Court Employees. To help court staff, especially new staff, as well as teachers, students, the media, and the public learn more about the federal courts, the Center has developed a web program, Inside the Federal Courts. The program describes what the courts do, their organization and role, and the civil, criminal, appellate, and bankruptcy processes. The program is available on the Center's site on the courts' intranet as well as our Internet site, www.fjc.gov.

II. Research Projects

Managing State Habeas Cases. We have completed our project to collect materials to assist federal district court judges to manage state habeas cases. The

materials discuss special considerations and issues in capital cases and describe systems or procedures courts have developed to deal with some of these issues. The materials will be available soon in electronic form on the Center's Intranet and Internet web sites, as a companion resource to the Center's compilation and summary of procedures used in handling federal death penalty cases. Both will be revised as the courts' experiences warrant.

Non-Prisoner Pro Se Litigation: Identifying Education and Training Opportunities. As noted in our last report, non-prisoner pro se litigation constitutes a significant portion of the district courts' civil caseloads. The Research Division is collaborating with the Judicial Education Division on developing two resources to help the district courts manage non-prisoner civil pro se litigation. The first product is an educational video on dealing with mentally ill or difficult litigants, especially those who present themselves to counter staff. The second product is an intranet site that compiles a wealth of information useful to district courts in developing strategies to manage pro se litigation. The site will include links to relevant FJC products in our new on-line Resource Catalog, resources posted by the courts in our Court Operations Exchange, summary filing data, and graphics illustrating the different resources and strategies adopted by the districts. We have developed on-going survey procedures for keeping this information up-to-date.

District Court Case Weight Study. The Center's project to update the district court case weights, which is being conducted at the request of the Committee on Judicial Resources, is nearing completion. District judge representatives from each of the twelve circuits met in a series of meetings held from August through November to arrive at consensus estimates for the time required to process various case events in their circuit. Two representatives from each of the circuit meetings then met in late January 2004 to develop final national consensus estimates for use in the district court case weight computations. Center staff have spent the last two months processing case event data from the courts' dockets and will integrate the time estimates with docketed event information to produce new district court case weights by the June 2004 meeting of the Statistics Subcommittee of the Committee on Judicial Resources.

Bankruptcy Court Case Weight Study. We are working closely with the Committee on the Administration of the Bankruptcy System to revise the current bankruptcy case weights. In April, the Center's Bankruptcy Case Weights Advisory Judges' Committee, chaired by Judge Rendell of the Bankruptcy Committee, met with project staff to review our progress to date, as well as to offer suggestions on various questions regarding our study. Our design calls for us to commence on October 1, 2004 the collection of actual judge time in a sample of bankruptcy cases.

Discovery of Electronic Documents/Evidence. We continue to assemble materials on electronic discovery and evidence on our web site (jnet.fjc.dcn). As the Discovery Subcommittee of the Civil Rules Advisory Committee consider possible amendments to FRCP Rules 16(b), 26(f)(3), 34(a), 37(f), and 45, we continue to monitor developments in this area by maintaining and updating a web-based, password-accessible database of information and materials from more than 250 continuing legal education courses on electronic discovery. We also continue to assist federal judges who are making public presentations, writing articles, or teaching courses on various aspects of electronic discovery and evidence.

Class Actions. The Advisory Committee on Civil Rules asked the Center to conduct a follow-up to our earlier report analyzing the rate at which class actions were filed in federal district courts. We surveyed a national sample of plaintiff and defense attorneys who have been involved in recently concluded class action cases to determine whether there is any discernible effect of recent U.S. Supreme Court decisions on attorney decisions to file class actions in federal district court rather than state court. We presented our report to the Advisory Committee at its April 2004 meeting and posted it on our Intranet and Internet web pages (jnet.fjc.dcn and www.fjc.gov). Also in the area of class actions, we have posted on those sites new class action notices in Spanish for securities and asbestos actions, as well as illustrative employment class action notices. Like the other notices that are available at the site, those notices were developed at the request of the Advisory Committee on Civil Rules to illustrate how lawyers and judges might comply with a change to Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure requiring that a notice to the class "must concisely and clearly state [certain information] in plain, easily understood language." The change in the rule took effect on December 1,

2003. We are working on a report documenting the process of creating those notices so that judges and lawyers will have a record of the tools and expertise we used.

Study of Sealed Settlement Agreements. As noted in our last report, at the request of the Civil Forfeiture/Settlement Sealing Subcommittee of the Civil Rules Advisory Committee, the Center examined the incidence of sealed settlement agreements in federal district courts and the circumstances surrounding the sealing of settlement agreements. At the April 2004 meeting of the Advisory Committee on Civil Rules we presented final results. Examining 288,846 cases in a sample of 52 districts, we found 1,270 cases that appear to have sealed settlement agreements, for a sealed settlement agreement rate of 0.44% in federal district court civil cases. In 97% of these cases, the complaint is not sealed, so the public has access to the plaintiffs' allegations in a large majority of these cases. The public record, however, seldom includes specific findings justifying the sealing of the agreements. The Center is publishing its report.

On-Site Consultations in Dispute Resolution. In July of last year, the Center announced its Program for Consultations in Dispute Resolution, which provides on-site consultations to district and bankruptcy courts seeking assistance with ADR programs. Judges and court staff who have substantial ADR expertise provide the consultations, which are supported by a grant from the Hewlett Foundation. We have received a inquiries to date, have completed nearly a dozen consultations, and are actively planning and scheduling more.

Federal-State Judicial Education Activities Web Site. The Federal State Jurisdiction Committee of the Judicial Conference asked for assistance with its efforts to maintain information on educational programs and activities for federal and state court judges. We developed an Internet web site where we continue to post whatever information we receive about recently conducted educational programs and activities that involve federal and state court judges.

Federal Judicial History Office. The Office has completed four units for its on-line educational project, "Teaching the History of the Federal Courts," which will describe and analyze fifteen famous federal trials related to significant public policy debates over the past 200 years. It has used FJC Foundation funds to contract with six

scholars to produce units for the project, which the office is developing in partnership with the American Bar Association's Division for Public Education. The division is seeking funds from outside sources for a pilot project to implement the program in a consortium of secondary schools throughout the nation. The on-line presentation of the case units will offer teachers guidelines for incorporating the materials in history courses and will provide judges with support materials for using the program in public outreach activities.

The office worked with the Center's Court Education Division to produce a half-hour video on oral history programs in the federal courts. The video was first broadcast on the FJTN in May 2004, and featured excerpts from oral histories with federal judges and interviews with people who conduct oral history programs for the federal courts.

5A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Jerry E. Smith, Chair**
Advisory Committee on Evidence Rules

DATE: **May 15, 2004**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules met on April 29th and 30th in Marina Del Rey, California. The Committee approved four proposed amendments to the Evidence Rules, with the recommendation that the Standing Committee approve them for release for public comment. The proposals are discussed as action items in this Report.

The Evidence Rules Committee also discussed proposals for amending Evidence Rules 410, 706, 803(3), 803(8), and 804(b)(3). After extensive discussion, the Committee decided not to propose any amendment to any of those rules. The Committee's decisions on those rules are discussed as information items in this Report.

Finally, the Committee reviewed some long-term projects that are summarized as information items in this Report. The draft minutes of the April meeting set forth a more detailed discussion of all the matters considered by the Committee. Those minutes are attached to this Report. Also attached are the proposed amendments recommended for release for public comment.

II. Action Items

A. Rule 404(a).

The proposed amendment to Evidence Rule 404(a) is intended to rectify a longstanding conflict in the courts about the admissibility of character evidence offered as circumstantial proof of conduct in a civil case. The original Rule was intended to establish a general rule that would bar the admission of character evidence when offered to prove a person's conduct. The rationale for this limitation was that the circumstantial use of character evidence can lead to a trial of personality and can cause a jury to decide the case on improper grounds. An exception to the general rule was made in criminal cases in deference to the possibility that an accused, whose liberty is at stake, might have nothing but his good character with which to defend himself. But some courts have permitted the circumstantial use of character evidence in civil cases as well. The amendment restores the Rule to its original scope. The Committee concluded that in civil cases, the substantial problems raised by character evidence outweigh the dubious benefit that such evidence might provide.

The Evidence Rules Committee unanimously approved the proposed amendment to Rule 404(a) and the proposed Committee Note. The proposed amendment and Committee Note are attached to this Report as Appendix A.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 404(a) be approved for release for public comment.

B. Rule 408

The proposal to amend Evidence Rule 408 would rectify three important and longstanding conflicts in the courts about the admissibility of statements and offers made in compromise negotiations. Those conflicts are resolved by the proposed amendment as follows:

1. *Admissibility in criminal cases:* Courts are in dispute over whether statements and offers made in compromise negotiations are admissible in subsequent criminal litigation. The proposed amendment provides that statements of fault made in the course of settlement negotiations would not be barred by Rule 408 in a subsequent criminal case. This position is taken in deference to the Justice Department's arguments that such statements can be critical evidence of guilt. In contrast, an offer or acceptance of a civil settlement would be excluded from criminal cases under the proposed Rule. This position recognizes that civil defendants may offer or agree to settle a litigation for reasons other than a recognition of fault.

2. *Scope of "impeachment" exception to the Rule:* Some courts have held that statements in compromise negotiations can be admitted at trial to impeach a witness by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule. The proposed amendment would prohibit the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. The Committee concluded that a limit on impeachment is more consistent with the goal of the Rule, which is to promote uninhibited settlement negotiations.

3. *Evidence excluded even if offered by the party who made the statement or offer of compromise:* Some courts hold that offers in compromise can be admitted in favor of the party who made the offer. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim. The proposed amendment would bar a party from introducing its own statements and offers, when offered to prove the validity, invalidity, or amount of the claim. The Committee concluded that the protections of Rule 408 cannot be waived unilaterally because the evidence would implicitly indicate that the adversary entered into compromise negotiations as well, and Rule 408 protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification.

The proposed amendment also reorganizes the Rule to make it easier to read and apply.

The Evidence Rules Committee approved the proposed amendment to Rule 408 and the proposed Committee Note by a vote of five to two. The proposed amendment and Committee Note are attached to this Report as Appendix B.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 408 be approved for release for public comment.

C. Rule 606(b)

The proposed amendment to Rule 606(b) would clarify whether statements from jurors can be admitted to prove some disparity between the verdict rendered and the verdict intended by the jurors. There are two basic reasons for an amendment to the Rule: 1) All courts have found an exception to the Rule permitting jury testimony to prove certain errors in the verdict, even though there is no language permitting such an exception in the text of the Rule; and 2) The courts have

long been in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach. Other courts follow a narrower exception permitting juror proof only if the verdict reported was the result of some clerical mistake. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical mistakes.

The proposed amendment to Rule 606(b) adopts the narrower exception, for clerical error. The Committee determined that a broader exception — permitting proof of juror statements whenever the jury misunderstood or ignored the court's instruction — would have intrude into juror deliberations and could undermine the finality of jury verdicts in a large and undefined number of cases. The broad exception therefore would be in tension with the policy of the Rule, which is to protect the confidentiality of juror deliberations. In contrast, an exception permitting proof of clerical mistakes in the rendering of a verdict would not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

The proposed Committee Note emphasizes that Rule 606(b) does not bar the court from polling the jury and taking steps to remedy any error that seems obvious when the jury is polled.

The Evidence Rules Committee approved the proposed amendment to Rule 606(b) and the proposed Committee Note by a vote of six to one. The proposed amendment and Committee Note are attached to this Report as Appendix C.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 606(b) be approved for release for public comment.

D. Rule 609

Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions that "involved dishonesty or false statement." Rule 609(a)(1) provides a balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2). The courts have long been in conflict over how to determine whether a certain conviction involves dishonesty or false statement within the meaning of Rule 609(a)(2). Some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. Other courts look at any available information to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime.

Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

The proposed amendment resolves the dispute over how to determine whether a conviction involves dishonesty or false statement under Rule 609(a)(2). The Committee initially preferred an approach that would focus on the "elements" of the witness's conviction; but it was persuaded by the Justice Department that convictions for some crimes should be admissible under Rule 609(a)(2) even though the elements of the crime do not always require deceit. An example is a conviction for obstruction of justice. The Department argued, and the Committee agreed, that it in some cases the underlying act of deceit could be determined by readily available information — such as a charging instrument — and that in such cases the conviction would be so probative of the witness's character for untruthfulness that it should be automatically admissible under Rule 609(a)(2). On the other hand, the Department of Justice agreed that the court should not be required to hold a mini-trial to determine whether the witness committed some deceitful act some time during the course of committing a crime.

The compromise eventually reached by the Committee would permit automatic impeachment when an element of the crime required proof of deceit, and it would go somewhat further to permit automatic impeachment if an underlying act of deceit could be "readily determined" from such information as the charging instrument. The proposed amendment also deletes the indefinite term that described the crime as one that "involved" dishonesty or false statement. Under the amendment, the crime actually must be a crime of dishonesty or false statement; a conviction is not admissible under Rule 609(a)(2) merely because there was some act of deceit in committing the crime.

The Evidence Rules Committee approved the proposed amendment to Rule 609 and the proposed Committee Note by a unanimous vote. The proposed amendment and Committee Note are attached to this Report as Appendix D.

Recommendation: The Evidence Rules Committee recommends that the proposed amendment to Evidence Rule 609 be approved for release for public comment.

III. Information Items

A. Long-Term Project on Possible Changes to Evidence Rules

As part of long-range planning the Evidence Rules Committee has reviewed scholarship, case law, and other sources of evidence law to determine whether there are any evidence rules that might be in need of amendment. The Committee agreed that the problematic rules should be considered

over the course of four Committee meetings and that if any Rules are found in need of amendment, the amendment proposals would be delayed in order to package them as a single set of proposed amendments to the Evidence Rules.

The proposed amendments agreed upon by the Committee are set forth above as action items for this meeting of the Standing Committee. A number of other proposals have been considered, but they have not met the strict threshold of necessity set by the Evidence Rules Committee for any proposed amendment.

At the Spring 2004 meeting the Committee voted to reject the following proposals:

1. *Rule 410:* The Committee considered a proposed amendment to Rule 410 that would protect statements and offers made by prosecuting attorneys, to the same extent that the Rule currently protects statements and offers made by defendants and their counsel. The policy behind such an amendment would be to encourage a free flow of discussion during guilty plea negotiations. At the Spring 2004 meeting, a number of questions and concerns were raised about the merits of the proposed amendment to Rule 410. The most important objection was that the amendment did not appear necessary, because no reported case has ever held that a statement or offer made by a prosecutor in a plea negotiation can be admitted against the government as an admission of the weakness of the government's case. The Committee concluded that there is no conflict among the courts that would be rectified by an amendment; and a conflict in the courts has always been considered by the Committee to be a highly desirable justification for an amendment to the Evidence Rules. The Committee voted to take no further action on an amendment to Rule 410.

2. *Rule 706:* Judge Gettleman requested that the Committee consider an amendment to Rule 706 that would make stylistic changes and that also would dispense with the requirement of an order to show cause before an expert is appointed as a witness. In its review of Rule 706, the Committee observed that the Rule does not address some important issues concerning the appointment of expert witnesses. Among the open issues are: standards for appointment, method for selection, ex parte contacts, jury instructions, and allocation of the expert witness's fee. The Committee concluded, however, that an amendment to Rule 706 was not necessary at this time. Rule 706 is rarely invoked, and those few courts that appoint expert witnesses do not appear to be having problems in resolving the questions left open by the existing Rule. The Committee agreed that Judge Gettleman's suggestions would improve the Rule, but concluded that this stylistic improvement did not justify the costs of an amendment to the Evidence Rules.

3. *Rule 803(3):* The Evidence Rules Committee considered a proposed amendment to Rule 803(3)—the hearsay exception for a declarant's statement of his or her state of mind. The possible need for amendment of Rule 803(3) arises from a dispute in the courts about whether the hearsay exception covers statements of a declarant's state of mind when offered to prove the conduct of another person. The Committee determined, however, that the Supreme Court's recent decision in

Crawford v. Washington rendered any amendment to a hearsay exception inappropriate at this time. The Court in *Crawford* radically revised its Confrontation Clause jurisprudence. This has a direct bearing on the scope of Rule 803(3), because the use of the state of mind exception to prove the conduct of a non-declarant occurs almost exclusively in criminal cases, where the statement is offered to prove the conduct of the accused.

The *Crawford* Court left a number of open questions that will be the subject of case law development. The Committee will monitor that case law development.

4. *Rule 803(8):* The Committee considered a proposed amendment on Rule 803(8)—the hearsay exception for public reports. The possible need for amendment of Rule 803(8) arises from several textual anomalies in the Rule and a dispute in the courts about the scope of the Rule. The Committee noted (as with Rule 803(3)) that any amendment to a hearsay exception is premature in light of the Supreme Court's recent decision in *Crawford v. Washington.* The problems that the courts have had with the public records exception arise almost exclusively when a public record is offered against a criminal defendant. This is the very situation addressed by the Court in *Crawford.* The Committee resolved unanimously to defer consideration of any amendment to Rule 803(8).

5. *Rule 804(b)(3):* In 2003 the Evidence Rules Committee proposed an amendment to Evidence Rule 804(b)(3), the hearsay exception for declarations against interest. The amendment provided that statements against penal interest offered by the prosecution in criminal cases would not be admissible unless the government could show that they carried "particularized guarantees of trustworthiness." The intent of the amendment was to assure that statements offered by the prosecution under Rule 804(b)(3) would comply with the constitutional safeguards imposed by the Confrontation Clause. The amendment was approved by the Judicial Conference and referred to the Supreme Court.

The amendment to Rule 804(b)(3) essentially codified the Supreme Court's then-existing Confrontation Clause jurisprudence, which required a showing of "particularized guarantees of trustworthiness" for hearsay admitted under an exception that was not "firmly rooted." But while the amendment was pending in the Supreme Court, that Court granted certiorari and decided *Crawford v. Washington. Crawford* essentially rejected the Supreme Court's prior jurisprudence, which had held that the Confrontation Clause demands that hearsay offered against an accused must be reliable. The *Crawford* Court replaced the reliability-based standard with a test dependent on whether the proffered hearsay is "testimonial."

Shortly after the Supreme Court decided *Crawford,* it sent the proposed amendment back to the Judicial Conference for reconsideration in light of *Crawford.* Now that the governing standards for the Confrontation Clause have been changed, the proposed amendment did not meet its intended goal. It embraced constitutional standards that are no longer applicable.

In reconsidering the proposed amendment after the Supreme Court's action, the Evidence Rules Committee determined that it was prudent to defer any consideration of an amendment to a

hearsay exception until the courts are given some time to develop the implications of *Crawford.* Any attempt to bring Rule 804(b)(3) into line with *Crawford* standards at this point would be unwise given the fact that those standards have not yet been clarified.

I wish to emphasize that in regard to any rules or other items as to which the Committee has indicated possible interest, the Committee continues to be wary of recommending changes that are not considered absolutely necessary to the proper administration of justice.

B. Privileges

The Committee's Subcommittee on Privileges has been working on a long-term project to prepare a "survey" of the existing federal common law of privileges. The end-product is intended to be a descriptive, non-evaluative presentation of the existing federal law, and not a proposal for any amendment to the Evidence Rules. The survey is intended to help courts and lawyers in working through the existing federal common law of privileges, and when completed it will be published as a work of the Consultant to the Committee and the Reporter.

The Committee has determined that the survey of each privilege will be structured as follows:

1. The first section will be a draft "survey" rule that sets out the existing federal law of the particular privilege. Where there is a significant split of authority in the federal courts, the draft would include alternative clauses or provisions.

2. The second section will be a commentary on existing federal law. This section would provide case law support for each aspect of the survey rule and an explanation of the alternatives, as well as a description of any aberrational case law. This commentary section is intended to be detailed but not encyclopedic

3. The third section will be a discussion of reasonably anticipated choices that the federal courts, or Congress if it elected to codify privileges, might take into consideration. For example, it will include the possibility of different approaches to the attorney-client privilege in the corporate context and the possibility of a general physician-patient privilege. This section, like the project itself, will be descriptive rather than evaluative.

The Subcommittee to this point has prepared all three sections on the psychotherapist-patient privilege, and will complete all of the materials on the attorney-client privilege by the next meeting.

C. Civil Rules That Operate As Rules of Evidence

A number of Civil Rules — most importantly Rules 32 and 44 — operate as rules of admissibility. The Evidence Rules Committee and Civil Rules Committee have both indicated interest in a project that would provide better integration of such rules. The goal of such a project would be to make it easier for lawyers to find rules of evidence in one body of law.

D. Forfeiture of Privilege Through Inadvertent Disclosure

The Evidence Rules Committee has been notified that the Civil Rules Committee is proposing a rule concerning waiver (more precisely, forfeiture) of privilege by inadvertent disclosure during the course of discovery. The proposed rule would govern the procedure for making a claim that disclosure was inadvertent. The rule does not purport to set forth substantive standards for when a forfeiture should or must be found. The Civil Rules Committee justifiably was concerned that a rule setting forth legal standards for determining forfeiture could be a rule of privilege requiring direct enactment by Congress. Such a rule would also, of course, be a rule of evidence, and would therefore be of interest to the Evidence Rules Committee.

The Civil Rules Committee has indicated its interest in working with the Evidence Rules Committee on a rule concerning inadvertent disclosure of privileged material. The Evidence Rules Committee shares this interest in a project on this important subject.

IV. Minutes of the April 2004 Meeting

The Reporter's draft of the minutes of the Evidence Rules Committee's April 2004 meeting is attached to this Report. These minutes have not yet been approved by the Evidence Rules Committee.

Attachments:

Proposed Amendment to Evidence Rule 404(a) and Committee Note
Proposed Amendment to Evidence Rule 408 and Committee Note
Proposed Amendment to Evidence Rule 606(b) and Committee Note
Proposed Amendment to Evidence Rule 609 and Committee Note

Draft Minutes

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE*

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim.— ~~Evidence~~ In a criminal case, and subject to the limitations imposed by Rule

---

*New material is underlined; matter to be omitted is lined through.

412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

* * *

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley*, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.*, 966 F.Supp. 203 (S.D.N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters

of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 408. Compromise and Offers to Compromise

(a) General rule. -- ~~Evidence of~~ The following is not admissible on behalf of any party, when offered as evidence of liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish~~,~~ —or ~~(2)~~ accepting or offering or promising to accept~~,~~ —a valuable consideration in compromising or attempting to compromise ~~a~~ the claim ~~which was disputed as to either validity or amount~~; and ~~, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

*New material is underlined; matter to be omitted is lined through.

(2) in a civil case, conduct or statements made in compromise negotiations ~~is likewise not admissible~~ regarding the claim.

~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

(b) Other purposes. -- This rule ~~also~~ does not require exclusion ~~when~~ if the evidence is offered for ~~another purpose,~~ ~~such as~~ purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ~~of a witness,~~ ; ~~negativing~~ negating a contention of undue delay~~,~~ ;~~or~~ and proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read. First, the amendment clarifies that Rule 408 does not protect against the use of statements and conduct during civil settlement negotiations when offered in a criminal case. *See, e.g.*, *United States v. Prewitt*, 34 F.3d

436, 439 (7th Cir. 1994) (statements made in civil settlement negotiations are not barred in subsequent criminal prosecutions, given the "public interest in the prosecution of crime"). Statements made in civil compromise negotiations may be excluded in criminal cases where the circumstances so warrant under Rule 403. But there is no absolute exclusion imposed by Rule 408.

The amendment distinguishes statements and conduct in compromise negotiations (such as a direct admission of fault) from an offer or acceptance of a compromise of a civil claim. An offer or acceptance of a compromise of a civil claim is excluded under the Rule if offered against a criminal defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as proof of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter defendants from settling a civil claim, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity", "invalidity", or "amount" of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange,* 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's

bad faith); *Coakley & Williams v. Structural Concrete Equip.*, 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.*, 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB,* 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). Nor does the amendment affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also*

EEOC v. Gear Petroleum, Inc., 948 F.2d 1542 (10th Cir.1991) (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir. 1992) (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.,* Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during

compromise negotiations. *See Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

"Clean Copy" of Proposed Amendment To Rule 408

To assist the Committee in its evaluation of the proposed amendment, a "clean copy" of the Rule incorporating all of the proposed amendment is set forth below. If the Committee votes to refer the amendment to the Standing Committee, that Committee will be provided with a clean copy as well.

Rule 408. Compromise and Offers to Compromise

(a) General rule. – The following is not admissible on behalf of any party, when offered as evidence of liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) in a civil case, conduct or statements made in compromise negotiations regarding the claim.

(b) Other purposes. – This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 606. Competency of Juror as Witness

(a) At the trial. — A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; ~~, except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial

---

*New material is underlined; matter to be omitted is lined through.

information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was improperly brought to bear upon any juror, or (3) whether the verdict reported is the result of a clerical mistake. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a clerical mistake. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of clerical mistakes, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the

jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.,* 836 F.2d 113, 116 (2d Cir. 1987); *Eastridge Development Co., v. Halpert Associates, Inc.,* 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R.,* 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.,* 862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the "clerical mistake" exception to the Rule is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

It should be noted that the possibility of clerical error will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence,* § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule

barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States,* 571 F.2d 876, 878-79 (5th Cir. 1978)).

PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE*

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime that readily can be determined to have been a crime of dishonesty or false statement shall be admitted ~~if it~~

---

*New material is underlined; matter to be omitted is lined through.

~~involved dishonesty or false statement~~, regardless of the punishment.

(b) Time limit. — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. — Evidence of a conviction is not admissible

under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime ~~which~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. — The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Committee Note

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the criminal act was itself an act of dishonesty or false statement. Evidence of all other crimes is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of their commission. Thus, evidence that a witness committed a violent crime, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

This amendment is meant to give effect to the legislative intent to limit the convictions that are automatically admissible under subsection (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subsection regardless of whether the crime was charged under a section that expressly references deceit (e.g., 18 U.S.C. § 1001, Material Misrepresentation to the Federal Government) or a section that does not (e.g., 18 U.S.C. § 1503, Obstruction of Justice).

The amendment also requires that the proponent have ready proof of the nature of the conviction. Ordinarily, the elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment – as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly – a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the witness was necessarily convicted of a crime of dishonesty or false statement. *Cf. Taylor v. United States*, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi.*

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction

was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

5B

Advisory Committee on Evidence Rules

Minutes of the Meeting of April 29th and 30th, 2004

Washington, D.C.

The Advisory Committee on the Federal Rules of Evidence (the "Committee") met on April 29th and 30th 2004 in Marina Del Rey, California.

The following members of the Committee were present:

Hon. Jerry E. Smith, Chair
Hon. Robert L. Hinkel
Hon. Jeffrey L. Amestoy
Thomas W. Hillier, Esq.
David S. Maring, Esq.
Patricia Refo, Esq.
John S. Davis, Esq., Department of Justice

Also present were:

Hon. David F. Levi, Chair of the Standing Committee on Rules of Practice and Procedure
Hon. Thomas W. Thrash, Jr., Liaison from the Standing Committee on Rules of Practice and Procedure
Hon. Christopher M. Klein, Liaison from the Bankruptcy Rules Committee
Hon. Paul Kelly, Liaison from the Civil Rules Committee
Robert Fiske, Esq., Liaison from the Criminal Rules Committee
Hon. C. Arlen Beam, Chair of the Drafting Committee for the Uniform Rules of Evidence
Professor Leo Whinery, Reporter to the Drafting Committee for the Uniform Rules of Evidence
Peter G. McCabe, Esq., Secretary, Standing Committee on Rules of Practice and Procedure
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Jennifer Marsh, Esq., Federal Judicial Center
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Adam J. Szubin, Department of Justice

Opening Business

Judge Smith extended a welcome to those who were attending an Evidence Rules Committee meeting for the first time: John Davis, the new Justice Department representative, Judge Kelly, who was substituting for Judge Kyle as Liaison from the Civil Rules Committee, and Robert Fiske, who was substituting for Judge Trager as Liaison from the Criminal Rules Committee. Judge Smith asked for approval of the draft minutes of the Fall 2003 Committee meeting. The minutes were approved unanimously. Judge Smith then gave a short report on the June 2003 Standing Committee meeting, noting that the Evidence Rules Committee had no action items for the agenda at that meeting.

On behalf of the Committee, Judge Smith expressed thanks and gratitude to Chief Justice Amestoy and to David Maring, whose terms on the Committee will expire before the next meeting.

Long-Range Planning — Consideration of Possible Amendments to Certain Evidence Rules

At its April 2001 meeting, the Committee directed the Reporter to review scholarship, case law, and other bodies of evidence law to determine whether there are any evidence rules that might be in need of amendment as part of the Committee's long-range planning. At the April 2002 meeting, the Committee reviewed a number of potential changes and directed the Reporter to prepare a report on a number of rules, so that the Committee could take an in-depth look at whether those rules require amendment.

At the October 2002 meeting, the Committee began to consider the Reporter's memoranda on some of the rules that have been found worthy of in-depth consideration. The Committee agreed that the problematic rules should be considered over the course of four Committee meetings, and that if any rules are found in need of amendment, the proposals would be delayed in order to package them as a single set of amendments to the Evidence Rules. This would mean that the package of amendments, if any, would go to the Standing Committee at its June 2004 meeting, with a recommendation that the proposals be released for public comment. With that timeline in mind, the Committee considered reports on several possibly problematic evidence rules at its meetings in 2003. At the Spring 2004 meeting, those rules were reviewed once again; the goal of the Committee was to determine whether to approve amendments to any of those rules for referral to the Standing Committee.

1. Rule 404(a)

At its Fall 2002 meeting, the Committee tentatively agreed on language that would amend Evidence Rule 404(a) to prohibit the circumstantial use of character evidence in civil cases. The Committee determined that an amendment is necessary because the circuits have long been split over whether character evidence can be offered to prove conduct in a civil case. Such a circuit split can cause disruption and disuniform results in the federal courts. Moreover, the question of the admissibility of character evidence to prove conduct arises frequently in section 1983 cases, so an amendment to the Rule would have a helpful impact on a fairly large number of cases. The Committee also concluded that as a policy matter, character evidence should not be admitted to prove conduct in a civil case. The circumstantial use of character evidence is fraught with peril in *any* case, because it could lead to a trial of personality and could cause the jury to decide the case on improper grounds. The risks of character evidence historically have been considered worth the costs where a criminal defendant seeks to show his good character or the pertinent bad character of the victim. This so-called "rule of mercy" is thought necessary to provide a counterweight to the resources of the government, and is a recognition of the possibility that the accused, whose liberty is at stake, may have little to defend with other than his good name. But none of these considerations is operative in civil litigation. In civil cases, the substantial problems raised by character evidence were considered by the Committee to outweigh the dubious benefit that character evidence might provide.

The Committee once again discussed the merits of the proposed amendment at the Spring 2004 meeting. A liaison suggested that character evidence could be important to a civil defendant charged with serious misconduct; but Committee members responded that the costs of allowing character evidence outweighed the benefits in civil cases. Specifically, the use of character evidence could result in a trial based on personality rather than the facts.

The Committee considered how the proposed amendment would affect habeas cases. Because habeas cases are civil cases, the amendment would prohibit the circumstantial use of character evidence by a habeas petitioner. Members pointed out that this is already the case under the current majority rule—the majority of courts currently prohibit the circumstantial use of character evidence in all civil cases. Moreover, the Evidence Rules do not break out habeas cases for special evidentiary treatment, and it would be anomalous to do so in this one Rule. The Committee resolved to undertake a long-term project that would assess the use of the Evidence Rules in habeas cases.

A Committee member suggested that the proposed Committee Note be revised slightly to clarify that the ban on circumstantial use of character evidence will apply to all civil cases, even where the defendant's conduct is closely related to criminal charges. The Committee agreed that such a clarification would be useful.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 404(a), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a unanimous vote.

The proposed amendment to Rule 404 provides as follows:

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

> (1) Character of accused.— ~~Evidence~~ In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
>
> (2) Character of alleged victim.— ~~Evidence~~ In a criminal case, and subject to the limitations of Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
>
> * * *

The Committee Note to the proposed amendment to Rule 404(a) provides as follows:

Committee Note

The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases.

Compare Carson v. Polley, 689 F.2d 562, 576 (5th Cir. 1982) ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp.,* 966 F.Supp. 203 (S.D. N.Y. 1997) (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F.Supp. 627, 629-30 (D. Ky.1984) ("It seems beyond peradventure of doubt that the drafters of F.R.Evi. 404(a) explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States,* 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules*, pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U.Pa.L.Rev. 845, 855 (1982) (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

2. Rule 408

The Reporter's memorandum on Rule 408, prepared for the Fall 2002 meeting, noted that the courts have been long-divided on three important questions concerning the scope of the Rule:

1) Some courts hold that evidence of compromise is admissible against the settling party in subsequent criminal litigation while others hold that compromise evidence is excluded in subsequent criminal litigation when offered as an admission of guilt.

2) Some courts hold that statements in compromise can be admitted to impeach by way of contradiction or prior inconsistent statement. Other courts disagree, noting that if statements in compromise could be admitted for contradiction or prior inconsistent statement, this would chill settlement negotiations, in violation of the policy behind the Rule.

3) Some courts hold that offers in compromise can be admitted in favor of the party who made the offer; these courts reason that the policy of the rule, to encourage settlements, is not at stake where the party who makes the statement or offer is the one who wants to admit it at trial. Other courts hold that settlement statements and offers are never admissible to prove the validity or the amount of the claim, regardless of who offers the evidence. These courts reason that the text of the Rule does not provide an exception based on identity of the proffering party, and that admitting compromise evidence would raise the risk that lawyers would have to testify about the settlement negotiations, thus risking disqualification.

At the Fall 2002 meeting, the Committee agreed to present, as part of its package, an amendment that would 1) limit the impeachment exception to use for bias, and 2) exclude compromise evidence even if offered by the party who made an offer of settlement. The remaining issue–whether compromise evidence should be admissible in criminal cases–was the subject of extensive discussion at the 2003 meetings and again at the Spring 2004 meeting. At all of these meetings, the Justice Department representative expressed concern that some statements made in civil compromise (e.g., to tax investigators) could be critical evidence needed in a criminal case to prove that the defendant had committed fraud. If Rule 408 were amended to exclude such statements in criminal cases, then this probative and important evidence would be lost to the government. The DOJ representative recognized the concern that the use of civil compromise evidence in criminal cases would deter civil settlements. But he contended that the Civil Division of the DOJ had not noted any deterrent to civil compromise from such a rule in the circuits holding that civil compromise evidence is indeed admissible in criminal cases.

Discussion of the Rule at the 2003 meetings indicated Committee dissatisfaction with Rule 408 as originally structured. As it stands, Rule 408 is structured in four sentences. The first sentence states that an offer or acceptance in compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The second sentence provides the same preclusion for statements made in compromise negotiations–an awkward construction because a separate sentence is used to apply the same rule of exclusion applied in the first sentence. The third sentence says that the rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The rationale of this sentence, added by Congress, is to prevent parties from immunizing pre-existing documents from discovery simply by bringing them to the negotiating table. The addition of this sentence at this point in the Rule, however, creates a structural problem because the fourth sentence of the rule contains a list of permissible purposes for compromise evidence, including proof of bias. As such, the third sentence provides a kind of break in the flow of the Rule. Moreover, the fourth sentence is arguably unnecessary, because none of the permissible purposes involves using compromise evidence to prove the validity or amount of the

claim. Under the Rule, the only impermissible purpose for compromise evidence is when it is offered to prove the validity or amount of a claim.

For the Fall 2003 meeting, the Reporter prepared a restructured Rule 408 for the Committee's consideration. Committee members expressed the opinion that the restructured Rule was easier to read and made it much easier to accommodate an amendment (previously agreed upon by the Committee) that would prohibit the use of compromise statements for impeachment by way of prior inconsistent statement or contradiction.

In the discussion of a restructured Rule 408, the Committee considered whether to retain the language of the existing Rule that evidence "otherwise discoverable" is not excluded merely because it was presented in the course of compromise negotiations. After extensive debate, the Committee agreed with courts, commentators, and rules drafters in several states, and concluded that the "otherwise discoverable" sentence is superfluous. It was added to the Rule to emphasize that pre-existing records were not immunized simply because they were presented to the adversary in the course of compromise negotiations. But such a pretextual use of compromise negotiations has never been permitted by the courts. The Committee therefore agreed, to drop the "otherwise discoverable" sentence from the text of the revised Rule 408, with an explanation for such a change to be placed in the Committee Note. The Committee also considered whether it was necessary to improve the language that triggers the protection of the amendment: the Rule applies to compromise negotiations as to a "matter which was in dispute." The Reporter prepared a description of the cases and commentary on this question and the Committee determined that it would not be appropriate to change this language, as the courts were not in conflict as to its application.

This left the question of the admissibility of compromise evidence in criminal cases. At the Spring 2004 meeting the DOJ representative reiterated the Department's position that Rule 408 should be completely inapplicable in criminal cases. But other Committee members argued for a distinction between statements made in settlement negotiations and the offer or acceptance of the settlement itself. It was noted — from the personal experience of several lawyers — that a defendant may decide to settle a civil case even though it strenuously denies wrongdoing. These Committee members argued that in such cases the settlement should not be admissible in criminal cases because the settlement is more a recognition of reality than an admission of criminality. Moreover, if the settlement itself could be admitted as evidence of guilt, defendants may choose not to settle, and this could delay needed compensation to those allegedly injured by the defendant's activities.

Committee members noted that the DOJ's concerns about admissibility of compromise evidence were almost if not completely limited to statements of fault made in compromise negotiations; such direct statements of criminality are obviously relevant to subsequent criminal liability, but the same does not apply to the settlement agreement itself. These Committee members recognized that even if Rule 408 were inapplicable to settlements, a particular settlement might nonetheless be excluded in a criminal case under Rule 403. But these members concluded that any protection under Rule 403 was too unpredictable for civil defendants to rely upon.

In light of the discussion, the Reporter revised the working draft, which had provided that Rule 408 was completely inapplicable in criminal cases. The new draft distinguished between offers and acceptances of settlement (inadmissible in criminal cases) and statements made in settlement negotiations (admissible in subsequent criminal litigation, subject of course to Rule 403). The DOJ representative opposed this draft, although he recognized that most of the Department's concerns went to the admissibility of statements rather than offers and acceptances. The Department representative contended that courts would have difficulty distinguishing between statements made in negotiation and the ultimate offer or acceptance. In many cases, the statement alleged to be admissible might be intertwined with the offer or acceptance. Thus, the Department representative contended that the proposed amendment would give rise to litigation as to its meaning. In contrast, the public defender on the Committee opposed the draft because it did not go far enough. He favored an amendment that would bar all civil compromise evidence from subsequent criminal litigation. He argued that civil defendants are often poorly represented, and as such they may unwittingly provide evidence of their guilt in the course of civil compromise negotiations. In his view, the proposed amendment would be a trap for the unwary insofar as it allowed statements made in compromise negotiations to be admissible in subsequent criminal cases.

Committee members also discussed some questions about the scope of the Rule. One question was whether the Rule would prevent proof of compromise evidence in a criminal case where the allegation is that the compromise itself was an act of extortion or other illegality. The Reporter responded that the current Rule would not exclude that evidence; courts have held that Rule 408 does not bar proof of wrongdoing in the settlement process because the compromise evidence is not offered to prove the invalidity of the underlying claim, but is rather offered as proof of a criminal act.

Committee members noted that many of the hard questions of Rule 408's applicability involved whether compromise evidence is offered for a purpose other than to prove the validity or amount of the civil claim. If compromise evidence can be offered in criminal cases to prove that the compromise itself was illegal, or to prove that the defendant by settling was made aware of the wrongfulness of his conduct, on the ground that the purpose for this kind of evidence was to prove something other than the validity or amount of the underlying claim, then much of the Department's concerns over Rule 408 protection would be answered. Committee members noted that it would be problematic to change the language in the text of the Rule concerning the "validity", "invalidity", or "amount" of the claim, as this language has been subject to extensive case law and it is by no means certain that an amendment would provide language that was any more clear than the current text. The Committee therefore directed the Reporter to add a paragraph to the Committee Note to clarify that there was no intent to change the existing law on whether compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of the claim.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 408, together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a 5-2 vote.

The proposed amendment to Rule 408 provides as follows:

Rule 408. Compromise and Offers to Compromise

(a) **General rule. --** ~~Evidence of~~ The following is not admissible on behalf of any party, when offered as evidence of liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish~~,~~ —or ~~(2)~~ accepting or offering or promising to accept~~,~~ —a valuable consideration in compromising or attempting to compromise ~~a~~ the claim ~~which was disputed as to either validity or amount; and~~ ~~, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of~~

(2) in a civil case, conduct or statements made in compromise negotiations ~~is likewise not admissible~~ regarding the claim.

~~This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.~~

(b) **Other purposes. --** This rule ~~also~~ does not require exclusion ~~when~~ if the evidence is offered for ~~another purpose, such as~~ purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ~~of a witness~~, ~~;~~ ~~negativing~~ negating a contention of undue delay~~,~~ ~~;or~~ and proving an effort to obstruct a criminal investigation or prosecution.

Committee Note

Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read. First, the amendment clarifies that Rule 408 does not protect against the use of statements and conduct during civil settlement negotiations when offered in a criminal case. *See, e.g.*, *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (statements made in civil settlement negotiations are not barred in subsequent criminal prosecutions, given the "public interest in the prosecution of crime"). Statements made in civil compromise negotiations may be excluded in criminal cases where the circumstances so warrant under Rule 403. But there is no absolute exclusion imposed by Rule 408.

The amendment distinguishes statements and conduct in compromise negotiations (such as a direct admission of fault) from an offer or acceptance of a compromise of a civil claim. An offer or acceptance of a compromise of a civil claim is excluded under the Rule if offered against a criminal defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as proof of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an

offer or acceptance could deter defendants from settling a civil claim, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity", "invalidity", or "amount" of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange,* 234 F.3d 357 (8th Cir. 2000) (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip.*, 973 F.2d 349 (4th Cir. 1992) (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp.*, 708 F.2d 683 (7th Cir. 1985) (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB,* 111 F.3d 1284 (6th Cir. 1997) (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). Nor does the amendment affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin,* 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel,* 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir.1991) (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 828 (2d Cir. 1992) (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.*, Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co. v. Rauch,* 644 F.2d 1097 (5th Cir. 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

3. Rule 410

At the Spring 2004 meeting the Committee continued its review of a possible amendment to Rule 410 that would protect statements and offers made by prosecuting attorneys, to the same extent as the Rule currently protects statements and offers made by defendants and their counsel. The policy behind such an amendment would be to encourage a free flow of discussion during guilty plea negotiations.

A draft proposal was prepared by the Reporter for the April 2003 meeting that added "against the government" to the opening sentence of the Rule, at the same place in which the Rule provides that offers and statements in plea negotiations are not admissible "against the defendant." At that meeting the Committee determined that this would not be a satisfactory drafting solution. If the Rule were amended only to provide that offers and statements in guilty plea negotiations were not admissible "against the government," this might provide too broad an exclusion. It would exclude, for example, statements made *by the defendant* during plea negotiations that could be offered "against the government," for example, to prove that the defendant had made a prior consistent statement, or to prove that the defendant believed in his own innocence, or was not trying to obstruct

an investigation. Thus, the Committee resolved that any change to Rule 410 should specify that the government's protection would be limited to statements and offers *made by prosecutors* during guilty plea negotiations.

At its Fall 2003 meeting the Committee considered a draft of an amendment to Rule 410 that would protect statements and offers made by prosecutors during guilty plea negotiations. Committee members discussed whether the government should be protected from statements and offers made by the prosecutor in plea negotiations even where the evidence is offered by a different defendant. All Committee members, including the DOJ representative, recognized that a defendant should be able to inquire into a deal struck or to be struck with a former codefendant who is a cooperating witness at the time of the trial–and such inquiry may be pertinent to the bias or prejudice of the cooperating witness even if a deal has not been formally reached or even offered. The working draft of the amendment was revised to provide that statements and offers of prosecutors would not be barred if offered to show the bias or prejudice of a government witness.

At the Spring 2004 meeting, a number of questions and concerns were raised about the merits of the draft amendment to Rule 410. The most important objection was that the amendment did not appear necessary, because no reported case has ever held that a statement or offer made by a prosecutor in a plea negotiation can be admitted against the government as an admission of the weakness of the government's case. Indeed, every reported case has held such evidence inadmissible when offered as a government-admission. It is true that some courts have used questionable authority to reach this result; for example, some courts have held that statements and offers made by prosecutors in guilty plea negotiations are excluded under Rule 408, even though that Rule applies only to statements and offers made to compromise a civil claim. Yet notwithstanding the questionable reasoning, the fact remains that there is no reported case that has failed to protect against admission of prosecution statements and offers in guilty plea negotiations. Accordingly, there is no conflict among the courts that would be rectified by an amendment; and a conflict in the courts has always been considered by the Committee to be a highly desirable justification for an amendment to the Evidence Rules.

Committee members also observed that the draft amendment could lead to some problematic results. For example, what if a defendant contended that he was a victim of prosecutorial misconduct or selective prosecution, and the prosecutor's statements during a plea negotiation provided relevant evidence of bad intent? Under the draft amendment, this important evidence would be excluded. And yet to provide an exception for such circumstances might result in an exception that would swallow the protective rule. That is, there would be a danger of the exception's applying whenever the defendant made a contention of "misconduct" on the part of the government.

Another problem case is where the defendant wants to testify that he rejected a guilty plea because he is innocent. This testimony would appear to be excluded by the proposed amendment because it would constitute evidence of the government's offer. It could be argued that the relevant evidence would be the defendant's rejection of the offer and not the offer itself, but that would seem to be an insubstantial distinction.

Given the problems involved in applying a rule that explicitly protects prosecution statements and offers, and the fact that the courts are reaching fair and uniform results under the current rules, including Rule 403, members of the Committee questioned whether the benefits of an amendment to Rule 410 would outweigh the costs. The Committee ultimately concluded that Rule 410 was not "broken," and therefore that the costs of a "fix" are not justified.

A motion was made and seconded to defer any proposed amendment to Rule 410. This motion was passed by a unanimous vote.

4. Rule 606(b)

At its April 2002 meeting, the Committee directed the Reporter to prepare a report on a possible amendment to Rule 606(b) that would clarify whether and to what extent juror testimony can be admitted to prove some disparity between the verdict rendered and the verdict intended by the jurors. At its Spring 2003 meeting, the Committee agreed in principle on a proposed amendment to Rule 606(b) that would be part of a possible package of amendments to be referred to the Standing Committee in 2004.

The Committee reviewed the working draft of the proposed amendment at its Fall 2003 meeting. Once again, all Committee members recognized the need for an amendment to Rule 606(b). There are two basic reasons for an amendment to the Rule: 1. All courts have found an exception to the Rule permitting jury testimony on certain errors in the verdict, even though there is no language permitting such an exception in the text of the Rule; and, more importantly, 2. The courts are in dispute about the breadth of that exception. Some courts allow juror proof whenever the verdict has an effect that is different from the result that the jury intended to reach, while other courts follow a narrower exception permitting juror proof only where the verdict reported is different from that which the jury actually reached because of some clerical error. The former exception is broader because it would permit juror proof whenever the jury misunderstood (or ignored) the court's instructions. For example, if the judge told the jury to report a damage award without reducing it by the plaintiff's proportion of fault, and the jury disregarded that instruction, the verdict reported would be a result different from what the jury actually intended, thus fitting the broader exception. But it would not be different from the verdict actually reached, and so juror proof would not be permitted under the narrow exception for clerical errors.

After extensive discussion at previous meetings, the Committee tentatively determined that an amendment to Rule 606(b) is warranted to rectify the long-standing conflict in the courts, and that the amendment should codify the narrower exception of clerical error. An exception that would permit proof of juror statements whenever the jury misunderstood or ignored the court's instruction would have the potential of intruding into juror deliberations and upsetting the finality of verdicts in a large and undefined number of cases. The broad exception would be in tension with the policies of the Rule. In contrast, an exception permitting proof only if the verdict reported is different from

that actually reached by the jury would not intrude on the privacy of jury deliberations, as the inquiry only concerns what the jury decided, not why it decided as it did.

At the Fall 2003 meeting, some Committee members suggested that the scope of the exception to Rule 60(b) should be comparable to the exception permitting a judge to correct a clerical mistake in a judgment under Civil Rule 60(a). But at the Spring 2004 meeting a member pointed out that the exceptions are not analogous. If the jury misunderstands the law and returns a verdict, it cannot be corrected as a clerical mistake. But if the clerk misunderstands the verdict and enters it incorrectly, that error could be corrected as a clerical mistake. In light of this comment, the Committee decided to refrain from including any reference to Civil Rule 60(a) in the Committee Note to the proposed amendment to Evidence Rule 606(b).

The Committee once again discussed whether the exception for juror proof should be made broader to permit correction of verdicts if the intent of the jury was clearly different from that indicated in the verdict reported. But Committee members noted that anything broader than an exception for "clerical mistake" would lead to a slippery slope, allowing evidence of jury deliberations whenever there is arguably a flaw in the decisionmaking process.

Finally, Committee members noted that it would be useful to emphasize that Rule 606(b) does not bar the court from polling the jury and from taking steps to remedy any error that seems obvious when the jury is polled. A paragraph to that effect was added to the proposed Committee Note.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 606(b), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a 6-1 vote.

The proposed amendment to Rule 606(b) provides as follows:

Rule 606. Competency of Juror as Witness

(a) *At the trial.* — A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting as a juror. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) *Inquiry into validity of verdict or indictment.* — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith; ~~, except that~~ But a juror may testify ~~on the question~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) ~~or~~ whether any outside influence was

improperly brought to bear upon any juror, or (3) whether the verdict reported is the result of a clerical mistake. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

The Committee Note to the proposed amendment to Rule 606(b) provides as follows:

Committee Note

Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a clerical mistake. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry.*, 5 F.3d 1, 3 (1st Cir. 1993) ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc.*, 148 F.Supp.2d 276, 278 (S.D. N.Y. 2001) (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of clerical mistakes, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc.*, 836 F.2d 113, 116 (2d Cir. 1987); *Eastridge Development Co., v. Halpert Associates, Inc.*, 853 F.2d 772 (10th Cir. 1988). The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R.*, 880 F.2d 68, 74 (8th Cir. 1989) (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp.*, 862 F.2d 1201, 1208 (5th Cir. 1989) ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the "clerical mistake" exception to the Rule is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or

mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

It should be noted that the possibility of clerical error will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence,* § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States,* 571 F.2d 876, 878-79 (5th Cir. 1978)).

5. Rule 609

Rule 609(a)(2) provides for automatic impeachment of all witnesses with prior convictions that "involved dishonesty or false statement." Rule 609(a)(1) provides a nuanced balancing test for impeaching witnesses whose felony convictions do not fall within the definition of Rule 609(a)(2). At its Spring 2002 meeting the Evidence Rules Committee directed the Reporter to prepare a memorandum to advise the Committee on whether it is necessary to amend Evidence Rule 609(a)(2). An investigation into this Rule indicates that the courts are in a long-standing conflict over how to determine whether a certain conviction involves dishonesty or false statement within Rule 609(a)(2). The basic conflict is that some courts determine "dishonesty or false statement" solely by looking at the elements of the conviction for which the witness was found guilty. If none of the elements requires proof of falsity or deceit beyond a reasonable doubt, then the conviction must be admitted under Rule 609(a)(1) or not at all. Most courts, however, look behind the conviction to determine whether the witness committed an act of dishonesty or false statement before or after committing the crime. Under this view, for example, a witness convicted of murder would have committed a crime involving dishonesty or false statement if he lied about the crime, either before or after committing it.

At its Fall 2003 meeting the Committee tentatively agreed that Rule 609(a)(2) should be amended to resolve the dispute in the courts over how to determine whether a conviction involves dishonesty or false statement. The Committee determined that an amendment would resolve an important issue on which the circuits are clearly divided. The Committee was at that time unanimously in favor of an "elements" definition of crimes involving dishonesty or false statement. Committee members noted that requiring the judge to look behind the conviction to the underlying facts could (and often does) impose a burden on trial judges. Moreover, the inquiry is indefinite because it is often impossible to determine, solely from a guilty verdict, what facts of dishonesty or false statement the jury might have found. Most importantly, whatever additional probative value there might be in a crime committed deceitfully, it is lost on the jury assessing the witness's

credibility when the elements of the crime do not in fact require proof of dishonesty or false statement. This is because when the conviction is introduced to impeach the witness, the jury is told only about the general nature of the conviction, not about its underlying facts.

Committee members noted that the "elements" approach to defining crimes that fall within Rule 609(a)(2) is litigant-neutral, in that it would apply to all witnesses in all cases. It was also noted that if a crime not involving false statement as an element (e.g., murder or drug dealing) were inadmissible under Rule 609(a)(2), it might still be admitted under the balancing test of Rule 609(a)(1); moreover, if such a crime *were* committed in a deceitful manner, the underlying facts of deceit might still be inquired into under Rule 608. Thus, the costs of an "elements" approach would appear to be low.

At the Spring 2004 meeting the Committee revisited the draft of an amendment to Rule 609(a)(2), under which a court would determine whether a conviction involved dishonesty or false statement solely by looking at the elements of the crime. The Department of Justice opposed this draft. The DOJ representative recognized that the change was litigant-neutral in that it would protect both prosecution and defense witnesses. Indeed the representative observed that Rule 609(a)(2) is invoked more frequently against the prosecution than it is against the defense. The DOJ representative also emphasized that the Department was not in favor of an open-ended rule that would require the court to divine from the record whether the witness committed some deceitful act in the course of a crime. But the Department was concerned that certain crimes that should be included as *crimina falsi* would not fit under a strict "elements" test. The prime example is obstruction of justice. It may be plain from the charging instrument that the witness committed obstruction by falsifying documents, and it may be evident from the circumstances that this fact was determined beyond a reasonable doubt. And yet deceit is not an absolutely necessary element of the crime of obstruction of justice; that crime could be committed by threatening a witness, for example.

The Department recognized that Rule 609(a)(2) is not the only avenue for admitting a conviction committed through deceit even though the elements do not require proof of receipt. Such a conviction could be offered under the Rule 609(a)(1) balancing test. But the Department's response was that Rule 609(a)(1) would not apply if the conviction is a misdemeanor; and moreover the balancing test of Rule 609(a)(1) might lead to a judge excluding the conviction even though it should really have been admitted under Rule 609(a)(2). The Department also recognized that the deceitful conduct could itself be admissible as a bad act under Rule 608(b). But the Department's response was that Rule 608(b) would not permit extrinsic evidence if the witness denied the deceitful conduct.

The Department also noted that an "elements" test would be dependent on the vagaries of charging and pleading. For example, if a person lies on a government form as part of a plan to obstruct justice, this misconduct could be charged under any number of offenses; some would have an element of false statement, some would not. The Department representative argued that it made no sense for the same conduct to receive different treatment under Rule 609(a)(2) depending solely on how that conduct is charged.

Committee members considered and discussed in detail the Department's objection to an amendment that would provide an "elements" test for determining which convictions fall under Rule 609(a)(2). Initially the Committee voted, over the Department representative's dissent, to adhere to the elements test. Committee members were concerned that anything other than an elements test would return to the poor state of affairs that currently exists in most courts, i.e., an indefinite and time-consuming "min-trial" to determine whether the witness committed some deceitful fact some time in the course of a crime. After extensive discussion, however, the Committee as a whole determined that there was no real conflict within the Committee about the goals of an amendment. Those goals are: 1) to resolve a long-standing dispute among the circuits over the proper methodology for determining when a crime is automatically admitted under Rule 609(a)(2); 2) to avoid a mini-trial into the facts supporting a conviction; and 3) to limit Rule 609(a)(2) to those crimes that are especially probative of the witness's character for untruthfulness.

The Committee resolved to allow the Reporter and the Department of Justice representatives to work on compromise language that would accomplish the goals on which everyone agreed. This work was done overnight and submitted for the Committee's review on the second day of the meeting. The compromise would permit automatic impeachment when an element of the crime required proof of deceit; but it would go somewhat further and permit automatic impeachment if an underlying act of deceit could be "readily determined" from such information as the charging instrument. Some Committee members expressed concern that the language might be too vague and might permit the mini-trial that the Committee sought to avoid. But other members pointed out that the burden is on the proffering party to show the underlying facts that readily indicate deceit, and that the term "readily available" provides the court with authority to terminate an inquiry it finds too indefinite or burdensome. Committee members also noted that the new draft deletes the indefinite term that identified the crime as one that "involved" dishonesty or false statement. Under the new draft, the crime actually must be a crime of dishonesty or false statement; it cannot be admitted under Rule 609(a)(2) merely because there was some act of deceit in committing the crime.

Committee members eventually agreed that the new draft captured the goals of the Committee in proposing an amendment to Rule 609(a)(2): it would rectify a conflict, prevent a mini-trial, and permit automatic admissibility for only those crimes that are especially probative of the witness's character for untruthfulness.

A motion was made and seconded to approve the proposed amendment to Evidence Rule 609(a)(2), together with the Committee Note, and to recommend to the Standing Committee that the proposal be released for public comment. The motion was approved by a unanimous vote.

The proposed amendment to Rule 609(a)(2) provides as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) General rule.—For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime that readily can be determined to have been a crime of dishonesty or false statement shall be admitted ~~if it involved dishonesty or false statement~~, regardless of the punishment.

* * *

The Committee Note to the Proposed Amendment to Rule 609(a)(2) provides as follows:

Committee Note

The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the criminal act was itself an act of dishonesty or false statement. Evidence of all other crimes is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of their commission. Thus, evidence that a witness committed a violent crime, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

This amendment is meant to give effect to the legislative intent to limit the convictions that are automatically admissible under subsection (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subsection regardless of whether the crime was charged under a section that expressly

references deceit (e.g., 18 U.S.C. § 1001, Material Misrepresentation to the Federal Government) or a section that does not (e.g., 18 U.S.C. § 1503, Obstruction of Justice).

The amendment also requires that the proponent have ready proof of the nature of the conviction. Ordinarily, the elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment – as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly – a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the witness was necessarily convicted of a crime of dishonesty or false statement. *Cf. Taylor v. United States*, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi.*

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subsection (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

6. Rule 706

Judge Gettleman has requested that the Committee consider an amendment to Rule 706 that would make stylistic changes and that also would dispense with the requirement of an order to show cause before an expert is appointed. Commentators have raised other problems in the administration of the Rule. At the Fall 2003 meeting, the Committee directed the Reporter to prepare a memorandum on Rule 706, so that the Committee could determine whether an amendment to the Rule should be included as part of the package to be sent to the Standing Committee.

The Committee reviewed and discussed the Reporter's memorandum on Rule 706. The Committee observed that Rule 706 does not address some important issues concerning the appointment of expert witnesses. Among the open issues are: standards for appointment, method for selection, ex parte contacts, jury instructions, and allocation of the expert witness's fee. The Committee ultimately concluded, however, that an amendment to Rule 706 was not necessary at this time. There is very little case law on Rule 706, and the case law that exists does not indicate that there is a conflict in interpreting the Rule. The courts do not appear to be having problems in resolving the questions left open by the existing Rule. Finally, while Judge Gettleman's stylistic

suggestions would provide an improvement, the Committee concluded that this improvement was not enough to justify the costs of an amendment to the Evidence Rules.

A motion was made and seconded to take no further action on an amendment to Rule 706. That motion was approved by a unanimous vote.

7. Rule 803(3)

At its Fall 2003 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 803(3)—the hearsay exception for a declarant's statement of his or her state of mind—so that the Committee could determine the necessity of an amendment to that Rule. The possible need for amendment of Rule 803(3) arises from a dispute in the courts about whether the hearsay exception covers statements of a declarant's state of mind when offered to prove the conduct of another person.

The Reporter's memorandum noted that the Supreme Court's decision in *Crawford v. Washington*, handed down after the Fall 2003 meeting, rendered any amendment to a hearsay exception inappropriate at this time. The Court in *Crawford* radically revised its Confrontation Clause jurisprudence. This has a direct bearing on the scope of Rule 803(3), because the use of the state of mind exception to prove the conduct of a non-declarant occurs almost exclusively in criminal cases, where the statement is offered to prove the conduct of the accused. This means that any amendment of Rule 803(3) that would apply to criminal cases is almost surely premature and unwise so shortly after *Crawford.*

The Committee agreed unanimously with the Reporter's conclusion. The Court in *Crawford* left open a number of questions about the relationship between hearsay exceptions and the Confrontation Clause. It held that the admission of "testimonial" hearsay violates the Confrontation Clause even if the hearsay is reliable — but it did not provide a definition of the term "testimonial." It intimated that if hearsay is not "testimonial" it might escape constitutional regulation entirely; but it did not so hold. Consequently, the full import of *Crawford* and of the constitutionality of the Federal Rules hearsay exceptions must await development by the courts, probably over a number of years. Under these circumstances, the Committee believes that it would be inappropriate to propose any amendment to a hearsay exception that would have a substantial effect in criminal cases.

The Committee directed the Reporter to keep it apprised of the case law as it develops after *Crawford.*

8. Rule 803(8)

At its Fall 2003 meeting the Evidence Rules Committee directed the Reporter to prepare a report on Rule 803(8)—the hearsay exception for public reports—so that the Committee could

determine the necessity of an amendment to that Rule. The possible need for amendment of Rule 803(8) arises from several anomalies in the Rule as well as a dispute in the courts about the scope of the Rule. The Reporter's memorandum noted (as with Rule 803(3)) that any amendment to a hearsay exception is probably premature in light of the Supreme Court's recent decision in *Crawford v. Washington*. The problems that the courts have had with the public records exception arise almost exclusively when a public record is offered against a criminal defendant. This is the very situation addressed by the Court in *Crawford*. The Committee resolved unanimously to defer consideration of any amendment to Rule 803(8).

9. Rule 804(b)(3)

In 2003 the Evidence Rules Committee proposed an amendment to Evidence Rule 804(b)(3). The amendment provided that statements against penal interest offered by the prosecution in criminal cases would not be admissible unless the government could show that the statements carried "particularized guarantees of trustworthiness." The intent of the amendment was to assure that statements offered by the prosecution under Rule 804(b)(3) would comply with constitutional safeguards imposed by the Confrontation Clause. The amendment was approved by the Judicial Conference and referred to the Supreme Court.

The amendment to Rule 804(b)(3) essentially codified the Supreme Court's Confrontation Clause jurisprudence, which required a showing of "particularized guarantees of trustworthiness" for hearsay admitted under an exception that was not "firmly rooted." But while the amendment was pending in the Supreme Court, that Court granted certiorari and decided *Crawford v. Washington*. *Crawford* essentially rejected the Supreme Court's prior jurisprudence, which had held that the Confrontation Clause demands that hearsay offered against an accused must be reliable. The *Crawford* Court replaced the reliability-based standard with a test dependent on whether the proffered hearsay is "testimonial."

Shortly after the Supreme Court decided *Crawford*, it considered the proposed amendment to Rule 804(b)(3). The Court decided to send the amendment back to the Standing Committee for reconsideration in light of *Crawford*. This action was not surprising, because the very reason for the amendment was to bring the Rule into line with the Confrontation Clause. Now that the governing standards for the Confrontation Clause have been changed, the proposed amendment did not meet its intended goal. It embraced constitutional standards that are no longer applicable.

For reasons discussed earlier in the meeting in the discussion of other hearsay exceptions, the Committee determined that it was prudent to hold off on any consideration of an amendment to a hearsay exception until the courts are given some time to figure out the meaning and all the implications of *Crawford*. Any attempt to bring Rule 804(b)(3) into line with *Crawford* standards at this point would be unwise given the fact that those standards have not yet been clarified.

PROJECT ON PRIVILEGES

At its Fall 2002 meeting, the Evidence Rules Committee decided that it would not propose any amendments to the Evidence Rules on matters of privilege. The Committee determined, however, that — under the auspices of its consultant on privileges, Professor Broun — it could perform a valuable service to the bench and bar by giving guidance on what the federal common law of privilege currently provides. This could be accomplished by a publication outside the rulemaking process, such as has been previously done with respect to outdated Advisory Committee Notes and caselaw divergence from the Federal Rules of Evidence. Thus, the Committee agreed to continue with the privileges project and determined that the goal of the project would be to provide, in the form of a draft rule and commentary, a "survey" of the existing federal common law of privilege. This essentially would be a descriptive, non-evaluative presentation of the existing federal law, not a "best principles" attempt to write how the rules of privilege "ought" to look. Rather, the survey would be intended to help courts and lawyers determine what the federal law of privilege actually is and where it might be going. The Committee determined that the survey of each privilege will be structured as follows:

1. The first section for each rule would be a draft "survey" rule that would set out the existing federal law of the particular privilege. Where there is a significant split of authority in the federal courts, the draft would include alternative clauses or provisions.

2. The second section for each rule would be a commentary on existing federal law. This section would provide case law support for each aspect of the survey rule and an explanation of the alternatives, as well as a description of any aberrational caselaw. This commentary section is intended to be detailed but not encyclopedic. It would include representative cases on key points rather than every case, and important law review articles on the privilege, but not every article.

3. The third section would be a discussion of reasonably anticipated choices that the federal courts, or Congress if it elected to codify privileges, might take into consideration. For example, it would include the possibility of different approaches to the attorney-client privilege in the corporate context and the possibility of a general physician-patient privilege. This section, like the project itself, will be descriptive rather than evaluative.

The materials on the psychotherapist-patient privilege were presented at the Fall 2003 meeting and were tentatively approved by the Committee.

At the Spring 2004 meeting Professor Broun presented, for the Committee's information and review, a draft of the survey rule and commentary on the attorney-client privilege. Committee members commended Professor Broun on his excellent work, and provided some comments and suggestions. Professor Broun noted that he would continue his work on the "future developments" section for the attorney-client privilege, and this work would be completed for the next meeting.

The Reporter noted that he would work on the materials on waiver and would provide some work product on that rule for the Committee to review at the next meeting.

New Business

1. Civil Rules Restyling

The Evidence Rules Committee considered whether it should provide any suggestions to the Civil Rules Committee concerning the restylization of two Civil Rules that have a bearing on the admissibility of evidence. Those rules are Rules 32 and 44. The Reporter provided the Committee with a memorandum on the subject.

One possible suggestion is to provide a uniform reference to the Federal Rules of Evidence whenever the Civil Rules refer to rules of admissibility. As it is currently restyled, Rule 32 refers both to the "rules of evidence" and to the "Federal Rules of Evidence." The Reporter noted that he had already provided a memorandum at the request of the Civil Rules Committee, suggesting that the references be made uniformly to the "Federal Rules of Evidence." The Civil Rules Committee is concerned, however, that the reference to "the rules of evidence" might intentionally be broader than the Federal Rules. It might encompass state rules, common law rules, and statutory rules of evidence. But the Reporter noted that the Federal Rules themselves incorporate these extrinsic rules of evidence. See, e.g., Rules 302, 402, 501, 801, and 1101. On the other hand, the Civil Rules Committee understandably wishes to be certain that a uniform reference will not create a change in any result. The Committee asked Professor Broun to research the matter to determine whether a uniform reference to the Federal Rules of Evidence could lead to a change of result in any case.

In all other respects, the Committee concluded that the restylized Rules 32 and 44 are excellent and would make those rules much easier to understand and more user-friendly.

The Reporter's memorandum on Rules 32 and 44 also noted that the Civil Rules Committee might be interested in a broader project that would better integrate the Civil Rules and the Evidence Rules. The Evidence Rules Committee has consistently concluded that rules of admissibility should be placed in the Evidence Rules. The Evidence Rules are where courts and litigators will look for the applicable rules of evidence. Yet there are a few Civil Rules (most importantly Rules 32 and 44) that specifically govern the admissibility of evidence at trial.

One possibility to be explored is whether these Civil Rules can be amended to provide that admissibility of deposition testimony (Rule 32) and public records (Rule 44) is governed by the Federal Rules of Evidence. This was the solution adopted by the Criminal Rules Committee when it amended Criminal Rule 11, which overlapped the provisions of Evidence Rule 410. Any similar change to the Civil Rules has been determined to be beyond the scope of the style project. The Evidence Rules Committee expressed its interest in a joint project with the Civil Rules Committee to provide a better integration between the Civil and Evidence Rules. But it was also noted that

such a project would have an effect on the Bankruptcy Rules and the Criminal Rules as well. So while the project would be a useful one, it might be better placed under the auspices of the Standing Committee.

2. Civil Rules Inadvertent Waiver Proposal

The liaison from the Civil Rules Committee reported that his Committee was proposing a rule concerning waiver of privilege by disclosure during the course of discovery. The proposed rule would govern the procedure for making a claim that disclosure was inadvertent. The rule does not purport to set forth substantive standards for when a waiver should or must be found. The Civil Rules Committee justifiably was concerned that a rule setting forth legal standards for determining waiver would be a rule of privilege requiring direct enactment by Congress. Such a rule would also, of course, be a rule of evidence, and would therefore be of interest to the Evidence Rules Committee.

The Civil Rules Committee has indicated its interest in working with the Evidence Rules Committee on a rule concerning inadvertent disclosure of privileged material. The Evidence Rules Committee unanimously agreed that a joint project on this important subject is in order. It was noted that the goal of the project might be a suggestion to Congress rather than a proposed rule through the rulemaking process.

NEXT MEETING

The next meeting of the Advisory Committee on Evidence Rules is scheduled for November 15th, 2004.

The meeting was adjourned Friday, April 30th.

Respectfully submitted,

Daniel J. Capra
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID F. LEVI
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

LEE H. ROSENTHAL
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

JERRY E. SMITH
EVIDENCE RULES

MEMORANDUM

DATE: May 14, 2004

TO: Judge David F. Levi, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 13 and 14, 2004, in Washington, D.C. The Committee approved all of the proposed amendments that had been published for comment in August 2003, including the controversial rule regarding the citation of unpublished opinions. The Committee also removed three items from the Committee's study agenda, tentatively approved one item for publication, and, at the request of the E-Government Subcommittee, discussed a draft rule intended to protect private information in court filings.

Detailed information about the Advisory Committee's activities can be found in the minutes of the April meeting and in the Committee's study agenda, both of which are attached to this report.

II. Action Items

Several proposed amendments to the Federal Rules of Appellate Procedure ("FRAP") were published for comment in August 2003.

The comments received by the Advisory Committee were unusual in several respects. First, we received an extraordinarily large number of comments: 513 written comments were submitted, and 15 witnesses testified at a public hearing on April 13. By contrast, a much more extensive set of proposed amendments published in August 2000 attracted 20 written comments

and no requests to testify. Second, the overwhelming majority of the comments — about 95 percent — pertained *only* to proposed Rule 32.1 (regarding the citing of unpublished opinions). Third, most of the comments on Rule 32.1 came from one circuit. About 75 percent of all comments (pro and con) regarding Rule 32.1 — and about 80 percent of the comments opposing Rule 32.1 — came from judges, clerks, lawyers, and others who work or formerly worked in the Ninth Circuit. Fourth, the vast majority of the comments on Rule 32.1 — about 90 percent — opposed adopting the rule. Finally, the comments regarding Rule 32.1 were extremely repetitive. Many repeated — word-for-word — the same basic "talking points" distributed by opponents of the rule, and many letters were identical or nearly identical copies of each other.

Because of the unusual nature of the public comments, I will report on them somewhat differently than we have reported on public comments in the past. With respect to every proposed rule except Rule 32.1, I will provide the following: (1) a brief introduction; (2) the text of the proposed amendment and Committee Note, as approved by the Committee; (3) a description of the changes made after publication and comments; and (4) a summary of each of the public comments. With respect to proposed Rule 32.1, I will provide the same information, except that I will not individually summarize each of the 513 written comments and each of the 15 statements given at the public hearing. Instead, I will summarize the major arguments made for and against adopting Rule 32.1, and then I will identify all those who supported or opposed the rule.

As I noted, the Advisory Committee approved all of the proposed amendments for submission to the Standing Committee. Modifications were made to most of the proposed amendments and Committee Notes, but, in the Committee's view, none of the modifications is substantial enough to require republication.

A. Rule 4(a)(6)

1. Introduction

Rule 4(a)(6) provides a safe harbor for litigants who fail to bring timely appeals because they do not receive notice of the entry of judgments against them. A district court is authorized to reopen the time to appeal a judgment if the district court finds that several conditions have been satisfied, including that the appellant did not receive notice of the entry of the judgment within 21 days and that the appellant moved to reopen the time to appeal within 7 days after learning of the judgment's entry. The Committee proposes to amend Rule 4(a)(6) to clarify what type of notice must be absent before an appellant is eligible to move to reopen the time to appeal and to resolve a four-way circuit split over what type of notice triggers the 7-day period to bring such a motion.

2. Text of Proposed Amendment and Committee Note

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE*

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to

---

* New material is underlined; matter to be omitted is lined through.

reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier:

~~(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry;~~ and

(C) the court finds that no party would be prejudiced.

* * * * *

Committee Note

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what type of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what type of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one substantive change has been made. As amended, the subdivision will preclude a

party from moving to reopen the time to appeal a judgment or order only if the party receives (within 21 days) formal notice of the entry of that judgment or order under Civil Rule 77(d). No other type of notice will preclude a party.

The reasons for this change take some explanation. Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* type of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what type of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) — has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made: The subdivision now makes clear that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period to move to reopen the time to appeal.

The circuits have been split over what type of "notice" is sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of

the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 304-05 (2d Cir. 1999)).

Former subdivision (a)(6)(A) — new subdivision (a)(6)(B) — has been amended to resolve this circuit split by providing that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period. Using Civil Rule 77(d) notice as the trigger has two advantages: First, because Civil Rule 77(d) is clear and familiar, circuit splits are unlikely to develop over its meaning. Second, because Civil Rule 77(d) notice must be served under Civil Rule 5(b), establishing whether and when such notice was provided should generally not be difficult.

Using Civil Rule 77(d) notice to trigger the 7-day period will not unduly delay appellate proceedings. Rule 4(a)(6) applies to only a small number of cases — cases in which a party was not notified of a judgment or order by either the clerk or another party within 21 days after entry. Even with respect to those cases, an appeal cannot be brought more than 180 days after entry, no matter what the circumstances. In addition, Civil Rule 77(d) permits parties to serve notice of the entry of a judgment or order. The winning party can prevent Rule 4(a)(6) from even coming into play simply by serving notice of entry within 21 days. Failing that, the winning party can always trigger the 7-day deadline to move to reopen by serving belated notice.

3. Changes Made After Publication and Comments

No change was made to the text of subdivision (A) — regarding the type of notice that precludes a party from later moving to reopen the time to appeal — and only minor stylistic changes were made to the Committee Note to subdivision (A).

A substantial change was made to subdivision (B) — regarding the type of notice that triggers the 7-day deadline for moving to reopen the time to appeal. Under the published version of subdivision (B), the 7-day deadline would have been triggered when "the moving party receives or observes written notice of the entry from any source." The Committee was attempting to implement an "eyes/ears" distinction: The 7-day period was triggered when a party learned of the entry of a judgment or order by reading about it (whether on a piece of paper or a computer screen), but was not triggered when a party merely heard about it.

Above all else, subdivision (B) should be clear and easy to apply; it should neither risk opening another circuit split over its meaning nor create the need for a lot of factfinding by district courts. After considering the public comments — and, in particular, the comments of two committees of the California bar — the Committee decided that subdivision (B) could do better on both counts. The published standard — "receives or observes written notice of the entry from any source" — was awkward and, despite the guidance of the Committee Note, was likely to give courts problems. Even if the standard had proved to be sufficiently clear, district courts would still have been left to make factual findings about whether a particular attorney or party "received" or "observed" notice that was written or electronic.

The Committee concluded that the solution suggested by the California bar — using Civil Rule 77(d) notice to trigger the 7-day period — made a lot of sense. The standard is clear; no one doubts what it means to be served with notice of the entry of judgment under Civil Rule 77(d). The standard is also unlikely to give rise to many

factual disputes. Civil Rule 77(d) notice must be formally served under Civil Rule 5(b), so establishing the presence or absence of such notice should be relatively easy. And, for the reasons described in the Committee Note, using Civil Rule 77(d) as the trigger will not unduly delay appellate proceedings.

For these reasons, the Committee amended subdivision (B) so that the 7-day deadline will be triggered only by notice of the entry of a judgment or order that is served under Civil Rule 77(d). (Corresponding changes were made to the Committee Note.) The Committee does not believe that the amendment needs to be published again for comment, as the issue of what type of notice should trigger the 7-day deadline has already been addressed by commentators, the revised version of subdivision (B) is far more forgiving than the published version, and it is highly unlikely that the revised version will be found ambiguous in any respect.

4. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendment.

Prof. Philip A. Pucillo of Ave Maria School of Law (03-AP-007) points out that subdivisions (A) and (C) begin with "the court finds," whereas subdivision (B) does not. He wonders whether there is a reason for this, such as an attempt to "emphasiz[e] that the determinations to be made in subsections (A) and (C) are factual findings subject to 'clearly erroneous' review, while the subsection (B) determination is a different creature." If no such reason exists, he recommends deleting "the court finds" in subdivisions (A) and (C) "as extraneous and potentially confusing."

The **Public Citizen Litigation Group** (03-AP-008) supports the proposed amendment.

Jack E. Horsley, Esq. (03-AP-011) supports the proposed amendment.

Philip Allen Lacovara, Esq. (03-AP-016) supports the substance of the proposed amendment, but regards the use of the term "observes" in subdivision (B) as "clumsy and obscure." He suggests substituting "obtains" or "acquires." He points out that the Committee Note would make clear the full scope of either term.

Robert Bstart (03-AP-071), a litigant whose appeal in a civil case was dismissed as untimely, recommends that Rule 4 be amended to apply a rule similar to the "prison mailbox rule" of Rule 4(c) to civil litigants who are not incarcerated.

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendment. It agrees that the deadline to move to reopen the time to appeal should be triggered only by written notice, and that "[e]xtending written notice to observation on the Internet is certainly appropriate."

The **Committee on Appellate Courts of the State Bar of California** (03-AP-319) supports proposed subdivision (A), which it believes helpfully clarifies that only formal notice of the entry of judgment under Civil Rule 77(d) forecloses a party from later moving to reopen the time to appeal. The Committee objects to proposed subdivision (B), though, both because it is unclear about what type of event triggers the 7-day deadline and because it is likely to lead to litigation over whether such an event occurred (for example, over whether an attorney who checked a docket actually "observed" that judgment had been entered). The Committee urges that subdivision (B) be revised so that only Civil Rule 77(d) notice triggers the 7-day deadline.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) agrees with the Committee on Appellate Courts.

The **Style Subcommittee** (04-AP-A) makes no suggestions.

B. Washington's Birthday Package: Rules 26(a)(4) and 45(a)(2)

1. Introduction

During the 1998 restyling of the Appellate Rules, the phrase "Washington's Birthday" was replaced with "Presidents' Day." The Advisory Committee concluded that this was a mistake. A federal statute — 5 U.S.C. § 6103(a) — officially designates the third Monday in February as "Washington's Birthday," and the other rules of practice and procedure — including the newly restyled Criminal Rules — use "Washington's Birthday." The Committee proposes to amend Rules 26(a)(4) and 45(a)(2) to replace "Presidents' Day" with "Washington's Birthday."

2. Text of Proposed Amendments and Committee Notes

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial

Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

* * * * *

Committee Note

Subdivision (a)(4). Rule 26(a)(4) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

Rule 45. Clerk's Duties

(a) General Provisions.

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

* * * * *

Committee Note

Subdivision (a)(2). Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's

Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

---

3. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

4. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendments.

The **Public Citizen Litigation Group** (03-AP-008) supports the proposed amendments.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendments.

The **Style Subcommittee** (04-AP-A) makes no suggestions.

C. New Rule 27(d)(1)(E)

1. Introduction

The Committee proposes to add a new subdivision (E) to Rule 27(d)(1) to make it clear that the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) apply to motion papers. Applying these restrictions to motion papers is necessary to prevent abuses — such as litigants using very small typeface to cram as many words as possible into the pages that they are allotted.

2. Text of Proposed Amendment and Committee Note

Rule 27. Motions

* * * * *

(d) Form of Papers; Page Limits; and Number of Copies.

(1) **Format.**

(A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all

four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) **Typeface and type styles.** The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

* * * * *

Committee Note

Subdivision (d)(1)(E). A new subdivision (E) has been added to Rule 27(d)(1) to provide that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6). The purpose of the amendment is to promote uniformity in federal appellate practice and to prevent the abuses that might occur if no restrictions were placed on the size of typeface used in motion papers.

---

3. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment or to the Committee Note.

4. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendment.

The **Public Citizen Litigation Group** (03-AP-008) supports the proposed amendment, but "only if the current page limits of Rule 27(d)(2) . . . are revised" — either to increase the number of pages (to 24 pages for motions and 12 pages for replies) or to express the limits in words instead of pages (5600 words for motions and 2800 words for replies). Public Citizen points out that most circuits now allow motions to be filed in 12- or even 11-point proportional font. Thus, the proposed amendment will substantially reduce the content of motion papers in most circuits. Increasing the page limits (or stating them in words, as Public Citizen would prefer) would compensate for this reduction and is justified by the fact that some motions — particularly dispositive motions — can be quite complex and require considerable briefing.

Matthew J. Sanders, Esq. (03-AP-122) supports the proposed amendment and recommends that the Committee go further and amend Rule 27 so that it imposes word limits, rather than page limits, on motions. He believes that the benefits of imposing word limits on briefs — "instead of worrying about altering paragraphs, headings, and sentence structure to meet a page limit, lawyers could spend more time on the substance of their work and simply follow a word limit" — would "apply equally to motions."

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendment.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendment.

The **Style Subcommittee** (04-AP-A) makes no suggestions.

D. Cross-Appeals Package: Rules 28(c) and 28(h), new Rule 28.1, and Rules 32(a)(7)(C) and 34(d)

1. Introduction

The Appellate Rules say very little about briefing in cases involving cross-appeals. This omission has been a continuing source of frustration for judges and attorneys, and most courts have filled the vacuum by enacting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. Not surprisingly, there are many inconsistencies among these local rules.

The Committee proposes to add a new Rule 28.1 that will collect in one place the few existing provisions regarding briefing in cases involving cross-appeals and add several new provisions to fill the gaps in the existing rules. Each of the new provisions reflects the practice of a large majority of circuits, save one: Although all circuits now limit the appellee's principal and response brief to 14,000 words, new Rule 28.1 will limit that brief to 16,500 words.

2. Text of Proposed Amendments and Committee Notes

Rule 28. Briefs

* * * * *

(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. ~~An appellee who has cross-appealed may file a brief in reply to the appellant's response to the~~

~~issues presented by the cross-appeal.~~ Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.

* * * * *

~~**(h) Briefs in a Case Involving a Cross-Appeal.** If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)-(11). But an appellee who is satisfied with appellant's statement~~

~~need not include a statement of the case or of the facts.~~

[Reserved]

* * * * *

Committee Note

Subdivision (c). Subdivision (c) has been amended to delete a sentence that authorized an appellee who had cross-appealed to file a brief in reply to the appellant's response. All rules regarding briefing in cases involving cross-appeals have been consolidated into new Rule 28.1.

Subdivision (h). Subdivision (h) — regarding briefing in cases involving cross-appeals — has been deleted. All rules regarding such briefing have been consolidated into new Rule 28.1.

Rule 28.1. Cross-Appeals

(a) Applicability. This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)-(B) do not apply to such a case, except as otherwise provided in this rule.

(b) Designation of Appellant. The party who files a notice of appeal first is the appellant for the purposes of this rule

and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(c) Briefs. In a case involving a cross-appeal:

(1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)–(3) and (11) and

must be limited to the issues presented by the cross-appeal.

(5) **No Further Briefs.** Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) Cover. Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and

response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) **Certificate of Compliance.** A brief submitted under Rule 28(e)(2) must comply with Rule 32(a)(7)(C).

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 3 days before argument unless the court, for good cause, allows a later filing.

Committee Note

The Federal Rules of Appellate Procedure have said very little about briefing in cases involving cross-appeals. This vacuum has frustrated judges, attorneys, and parties who have sought guidance in the rules. More importantly, this vacuum has been filled by conflicting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. These local rules have created a hardship for attorneys who practice in more than one circuit.

New Rule 28.1 provides a comprehensive set of rules governing briefing in cases involving cross-appeals. The few existing provisions regarding briefing in such cases have been moved into new Rule 28.1, and several new provisions have been added to fill the gaps in the existing rules. The new provisions reflect the practices of the large majority of circuits and, to a significant extent, the new provisions have been patterned after the requirements imposed by Rules 28, 31, and 32 on briefs filed in cases that do not involve cross-appeals.

Subdivision (a). Subdivision (a) makes clear that, in a case involving a cross-appeal, briefing is governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B), except to the extent that Rule 28.1 specifically incorporates those rules by reference.

Subdivision (b). Subdivision (b) defines who is the "appellant" and who is the "appellee" in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule 28(h), except that subdivision (b) refers to a party being designated as an appellant "for the purposes of this rule and Rules 30 and 34," whereas former Rule 28(h) also referred to Rule 31. Because the matter

addressed by Rule 31(a)(1) — the time to serve and file briefs — is now addressed directly in new Rule 28.1(f), the cross-reference to Rule 31 is no longer necessary. In Rule 31 and in all rules other than Rules 28.1, 30, and 34, references to an "appellant" refer both to the appellant in an appeal and to the cross-appellant in a cross-appeal, and references to an "appellee" refer both to the appellee in an appeal and to the cross-appellee in a cross-appeal. Cf. Rule 31(c).

Subdivision (c). Subdivision (c) provides for the filing of four briefs in a case involving a cross-appeal. This reflects the practice of every circuit except the Seventh. *See* 7th Cir. R. 28(d)(1)(a).

> The first brief is the "appellant's principal brief." That brief — like the appellant's principal brief in a case that does not involve a cross-appeal — must comply with Rule 28(a).
>
> The second brief is the "appellee's principal and response brief." Because this brief serves as the appellee's principal brief on the merits of the cross-appeal, as well as the appellee's response brief on the merits of the appeal, it must also comply with Rule 28(a), with the limited exceptions noted in the text of the rule.
>
> The third brief is the "appellant's response and reply brief." Like a response brief in a case that does not involve a cross-appeal — that is, a response brief that does not also serve as a principal brief on the merits of a cross-appeal — the appellant's response and reply brief must comply with Rule 28(a)(2)-(9) and (11), with the exceptions noted in the text of the rule. *See* Rule 28(b). The one difference between the appellant's response and reply brief, on the one hand, and a response brief filed in a case that does not involve a cross-

appeal, on the other, is that the latter must include a corporate disclosure statement. *See* Rule 28(a)(1) and (b). An appellant filing a response and reply brief in a case involving a cross-appeal has already filed a corporate disclosure statement with its principal brief on the merits of the appeal.

The fourth brief is the "appellee's reply brief." Like a reply brief in a case that does not involve a cross-appeal, it must comply with Rule 28(c), which essentially restates the requirements of Rule 28(a)(2)–(3) and (11). (Rather than restating the requirements of Rule 28(a)(2)-(3) and (11), as Rule 28(c) does, Rule 28.1(c)(4) includes a direct cross-reference.) The appellee's reply brief must also be limited to the issues presented by the cross-appeal.

Subdivision (d). Subdivision (d) specifies the colors of the covers on briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(2), which does not specifically refer to cross-appeals.

Subdivision (e). Subdivision (e) sets forth limits on the length of the briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(7), which does not specifically refer to cross-appeals. Subdivision (e) permits the appellee's principal and response brief to be longer than a typical principal brief on the merits because this brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. Likewise, subdivision (e) permits the appellant's response and reply brief to be longer than a typical reply brief because this brief serves not only as the reply brief in the appeal, but also as the response brief in the cross-appeal. For purposes of determining the maximum length of an amicus curiae's brief filed in a case involving a cross-appeal, Rule 29(d)'s reference to "the maximum length

authorized by these rules for a party's principal brief" should be understood to refer to subdivision (e)'s limitations on the length of an appellant's principal brief.

Subdivision (f). Subdivision (f) provides deadlines for serving and filing briefs in a cross-appeal. It is patterned after Rule 31(a)(1), which does not specifically refer to cross-appeals.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

* * * * *

(C) **Certificate of Compliance.**

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line

count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

* * * * *

Committee Note

Subdivision (a)(7)(C). Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume limitations that apply to such briefs, and Rule 28.1(e)(3)

requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

Rule 34. Oral Argument

* * * * *

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule ~~28(h)~~ 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

* * * * *

Committee Note

Subdivision (d). A cross-reference in subdivision (d) has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

---

3. Changes Made After Publication and Comments

The Committee adopted the recommendation of the Style Subcommittee that the text of Rule 28.1 be changed in a few minor respects to improve clarity. (That recommendation is described below.) The Committee also adopted three suggestions made by the Department of Justice: (1) A sentence was added to the Committee Note to Rule 28.1(b) to clarify that the term "appellant" (and "appellee") as used by rules other than Rules 28.1, 30, and 34, refers to both the appellant in an appeal and the cross-appellant in a cross-appeal (and to both the appellee in an appeal and the cross-appellee in a cross-appeal). (2) Rule 28.1(d) was amended to prescribe cover colors for supplemental briefs and briefs filed by an intervenor or amicus curiae. (3) A few words were added to the Committee Note to Rule 28.1(e) to clarify the length of an amicus curiae's brief.

4. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendments.

The **Public Citizen Litigation Group** (03-AP-008) "applaud[s]" the proposed amendments, which would "streamline the briefing process and achieve national uniformity where diversity serves no purpose." Public Citizen objects, though, that the 16,500 word limit on the appellee's principal and response brief "seems a bit stingy," as this brief "combines two *principal* briefs." Public Citizen "recognize[s] that combining briefs achieves some economy," but argues that "18,000 words — or 1650 lines of text in a monospaced face — would better accommodate the needs of the appellee in complex cross appeals." As for the appellant's response and reply brief, Public Citizen argues that the limit should be increased to 15,000 words or 1,400 lines, as this brief must serve the functions of

a principal response brief (typically limited to 14,000 words or 1,300 lines) and a reply brief (typically limited to 7,000 words or 650 lines).

Philip Allen Lacovara, Esq. (03-AP-016) supports the proposed amendments, which he says are "particularly welcome." He has only a couple of objections:

1. Mr. Lacovara is concerned that use of the phrase "a case" in Rule 28.1(a) "may create an unintended ambiguity," as "[i]n most if not all circuits, each appeal, including a cross-appeal, is assigned a separate docket number and thus is technically a distinct appellate 'case,' even though the separate cases are typically consolidated." He suggests adding the following sentence at the end of Rule 28.1(a): "This Rule governs the briefs of all parties where an appeal and one or more cross-appeals are taken from the same order or judgment." This, he says, would "make clear that [the new rule] appl[ies] to all parties to all related cases involving cross-appeals from the same judgment or order."

2. Mr. Lacovara objects to the 16,500 word limit on the appellee's principal and response brief and, more generally, to giving the appellant 28,000 total words while giving the appellee only 23,500. He argues that it is "mistaken" to assume that a "cross-appeal is likely to pose relatively insignificant issues that can be treated effectively and intelligibly in a summary fashion or by simply adopting much of the appellant's opening brief." He notes that "the designation of 'appellant' and 'appellee' . . . is simply the result of the fortuity of timing," meaning that "[t]he cross-appeal may be just as substantial as the opening appeal." He suggests that "a more realistic maximum" for the appellee's principal and response brief would be 21,500 words.

3. Mr. Lacovara suggests that the rule should include a requirement that "both the appellee's principal and response brief and the appellant's response and reply brief contain appropriate headings demarcating the portion of the argument that addresses that party's own appeal and the portion that is addressing the other party's appellate points."

Chief Judge Haldane Robert Mayer of the Federal Circuit (03-AP-086) reports that the judges on his circuit unanimously oppose Rule 28.1 insofar as it would increase the word limits on briefs beyond what the Federal Circuit's local rules now permit. The Federal Circuit's local rules provide for four briefs, as Rule 28.1 would, but limit those four briefs to 14,000, 14,000, 7,000, and 7,000 words, whereas Rule 28.1 would increase those limits to 14,000, 16,500, 14,000, and 7,000. Rule 28.1 would thus significantly lengthen the briefs submitted to the Federal Circuit in cross-appeals.

Judge Mayer argues that the extra space is not needed. The space permitted by the Federal Circuit in cross-appeals — 21,000 words for each side — is ample in most cases. In the rare case in which 21,000 words is insufficient, the parties can ask for permission to file longer briefs. The Federal Circuit "finds that cross-appeals are often filed improperly in order to secure an additional brief and the last word," and Rule 28.1 will "greatly exacerbate this problem" by increasing the word count for cross-appeals.

Counsel tend to use every word that they are allotted, so it is predictable that counsel will use all of the extra words that Rule 28.1 would give them. This will mean longer briefs, more repetition in briefs, and more briefing of marginal issues that counsel would otherwise drop. The courts of appeals do not need the additional work.

If a national rule regarding cross-appeals is adopted, the Federal Circuit urges that "the increased word count be limited to the subject matter of the cross-appeal, not the response to the main appeal." Many cross-appeals involve issues that are few, minor, or conditional. Under proposed Rule 28.1, parties could address such issues in a few words, and then use most of their 16,500 words on an extra-long response in the appeal.

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendments. It argues, though, that the word limit on the appellee's principal and response brief should be increased to 28,000, and the word limit on the appellant's response and reply brief to 21,000. Cross-appeals often raise issues that are as significant as — if not more significant than — the issues raised in appeals. Each side should have the same number of words, and each side should be given a total of 35,000 — to allow each side to submit the equivalent of a typical principal brief on the appeal (14,000) and the cross-appeal (14,000) and the equivalent of a typical reply brief (7,000).

Senior Judge S. Jay Plager of the Federal Circuit (03-AP-297) agrees with Judge Mayer.

The **Committee on Appellate Courts of the State Bar of California** (03-AP-319) supports the proposed amendments, which "succeed in providing clarity, collecting in one place all the provisions concerning the subject matter of cross-appeals, eliminating inconsistencies among various Circuit rules, and adding new provisions to fill existing gaps." Its one objection is to the word limits. The Committee objects to giving the appellant a total of 28,000 words, but the appellee only 23,500. Although some cross-appeals are merely protective and can be addressed with fewer words, many other cross-appeals involve difficult legal issues or complicated

factual scenarios that may not have been addressed — at least adequately — in the appeal. Moreover, the designation of parties as "appellant" and "appellee" often reflects nothing more than who won the race to the courthouse; 4,500 words of briefing space should not turn on such an arbitrary matter. The Committee urges that the word limit on the appellee's principal and response brief be increased from 16,500 to 21,000.

Judge Frank H. Easterbrook of the Seventh Circuit (03-AP-367) objects to imposing a four-brief system in cross-appeals on the Seventh Circuit (which alone permits only three briefs) and argues that, if a four-brief system is to be imposed, the word limits should be adjusted "so that the normal type volume is spread across those briefs." He suggests that "[s]omething like 9,000, 13,000, 9,000, and 5,000 (18,000 words on each side, or 36,000 total) would work nicely." He points out that, if a case was so complex that more words were essential, parties could seek permission to file longer briefs. "Far better to start with 36,000 words in the normal case and go up if necessary, than to make 51,500 words the norm."

Judge Easterbrook describes the justification for the Seventh Circuit's three-brief practice as follows: "Many lawyers file unnecessary cross appeals either out of carelessness or, worse, an effort to obtain a self-help increase in the allowable type volume." Many lawyers do not realize that they do not need to file a cross-appeal to defend a judgment on a ground not relied on by the district court. Or they do realize it, but file a cross-appeal anyway, in order to get additional brief space. (Under Rule 28.1, they would get "a 50% increase for the cost of one measly appellate filling fee!") For these reasons, the Seventh Circuit went to a three-brief system, "with an invitation to counsel to apply for more words (or a fourth brief) when there was a genuine need. Very few such applications are filed,

and the number of cross appeals has substantially declined, showing that many had indeed been strategic."

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendments. It specifically "agrees that because cross-appeals are often protective in nature and the issues raised are often related to the underlying appeal, the cross-appellant does not necessarily always need as many words/length of brief as the appellant." It also points out that, if the cross-appellant needs more words, he or she can ask for them.

The **Style Subcommittee** (04-AP-A) makes these suggestions:

1. In the final sentence of Rule 28.1(b), replace "agreement of the parties" with "the parties' agreement."

2. In the final two sentences of Rule 28.1(c)(4), insert "and" in place of the period after "(11)" and delete "That brief" and "also," so that what remains is: "That brief must comply with Rule 28(a)(2)–3 and (11) and must be limited to the issues presented by the cross-appeal."

3. Rewrite Rule 28.1(f) as follows:

(f) Time to Serve and File a Brief. Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 3 days before argument unless the court, for good cause, allows a later filing.

E. New Rule 32.1

1. Introduction

The Committee proposes to add a new Rule 32.1 that will require courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "non-precedential," or the like. New Rule 32.1 will also require parties who cite "unpublished" or "non-precedential" opinions that are not available in a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties.

2. Text of Proposed Amendment and Committee Note

Rule 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

(b) Copies Required. If a party cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the

party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of unpublished opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of unpublished opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as unpublished. Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of unpublished opinions, most agree that an unpublished opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an unpublished opinion as binding precedent is constitutional. *Compare Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001), *with Anastasoff v. U.S.*, 223 F.3d 898, 899-905,

vacated as moot on reh'g en banc 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as unpublished or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed unpublished opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an unpublished opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed on the citation of unpublished opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because a party hopes that it will influence the court as, say, the opinion of another court of appeals or a district court might. Some circuits have freely permitted the citation of unpublished opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances.

Parties seek to cite unpublished opinions in another context in which parties do not argue that the opinions bind the court to reach a particular result. Frequently, parties will seek to bolster an argument by pointing to the presence or absence of a substantial number of unpublished opinions on a particular issue or by pointing to the consistency or inconsistency of those unpublished opinions. Most no-citation rules do not clearly address the citation of unpublished opinions in this context.

Rule 32.1(a) is intended to replace these inconsistent and unclear standards with one uniform rule. Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal or state court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of unpublished opinions. For example, a court may not instruct parties that the citation of unpublished opinions is disfavored, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

Rules prohibiting or restricting the citation of unpublished opinions — rules that forbid a party from calling a court's attention to the court's own official actions — are inconsistent with basic principles underlying the rule of law. In a common law system, the presumption is that a court's official actions may be cited to the court, and that parties are free to argue that the court should or should not act consistently with its prior actions. In an adversary system, the presumption is that lawyers are free to use their professional judgment in making the best arguments available on behalf of their clients. A prior restraint on what a party may tell a court about the court's own rulings may also raise First Amendment concerns. But whether or not no-citation rules are constitutional — a question on

which neither Rule 32.1 nor this Note takes any position — they cannot be justified as a policy matter.

No-citation rules were originally justified on the grounds that, without them, large institutional litigants who could afford to collect and organize unpublished opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of unpublished opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, unpublished opinions are as readily available as "published" opinions, and soon every court of appeals will be required to post all of its decisions — including unpublished decisions — on its website "in a text searchable format." *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. Barring citation to unpublished opinions is no longer necessary to level the playing field.

As the original justification for no-citation rules has eroded, many new justifications have been offered in its place. Three of the most prominent deserve mention:

1. First, defenders of no-citation rules argue that there is nothing of value in unpublished opinions. These opinions, they argue, merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err. Unpublished opinions do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the law; or address a legal issue in which the public has a significant interest. For these reasons, no-citation rules do not deprive the courts or parties of anything of value.

This argument is not persuasive. As an initial matter, one might wonder why no-citation rules are necessary if all unpublished opinions are truly valueless. Presumably parties will not often seek to cite or even to read worthless opinions. The fact is, though, that unpublished opinions are widely read, often cited by attorneys (even in circuits that forbid such citation), and occasionally relied upon by judges (again, even in circuits that have imposed no-citation rules). *See, e.g.*, *Harris v. United Fed'n of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002). Unpublished opinions are often read and cited precisely because they can contain valuable information or insights. When attorneys can and do read unpublished opinions — and when judges can and do get influenced by unpublished opinions — it only makes sense to permit attorneys and judges to talk with each other about unpublished opinions.

Without question, unpublished opinions have substantial limitations. But those limitations are best known to the judges who draft unpublished opinions. Appellate judges do not need no-citation rules to protect themselves from being misled by the shortcomings of their own opinions. Likewise, trial judges who must regularly grapple with the most complicated legal and factual issues imaginable are quite capable of understanding and respecting the limitations of unpublished opinions.

2. Second, defenders of no-citation rules argue that unpublished opinions are necessary for busy courts because they take much less time to draft than published opinions. Knowing that published opinions will bind future panels and lower courts, judges draft them with painstaking care. Judges do not spend as much time on drafting unpublished opinions, because judges know that such opinions function only as explanations to those involved in the cases. If unpublished opinions could be cited, the argument goes, judges

would respond by issuing many more one-line judgments that provide no explanation or by putting much more time into drafting unpublished decisions (or both). Both practices would harm the justice system.

The short answer to this argument is that numerous federal and state courts have abolished or liberalized no-citation rules, and there is no evidence that any court has experienced any of these consequences. It is, of course, true that every court is different. But the federal courts of appeals are enough alike, and have enough in common with state supreme courts, that there should be *some* evidence that permitting citation of unpublished opinions results in, say, opinions being issued more slowly. No such evidence exists, though.

3. Finally, defenders of no-citation rules argue that abolishing no-citation rules will increase the costs of legal representation in at least two ways. First, it will vastly increase the size of the body of case law that will have to be researched by attorneys before advising or representing clients. Second, it will make the body of case law more difficult to understand. Because little effort goes into drafting unpublished opinions, and because unpublished opinions often say little about the facts, unpublished opinions will introduce into the corpus of the law thousands of ambiguous, imprecise, and misleading statements that will be represented as the "holdings" of a circuit. These burdens will harm all litigants, but particularly pro se litigants, prisoners, the poor, and the middle class.

The short answer to this argument is the same as the short answer to the argument about the impact on judicial workloads: Over the past few years, numerous federal and state courts have abolished

or liberalized no-citation rules, and there is no evidence that attorneys and litigants have experienced these consequences.

The dearth of evidence of harmful consequences is unsurprising, for it is not the ability to *cite* unpublished opinions that triggers a duty to research them, but rather the likelihood that reviewing unpublished opinions will help an attorney in advising or representing a client. In researching unpublished opinions, attorneys already apply and will continue to apply the same common sense that they apply in researching everything else. No attorney conducts research by reading every case, treatise, law review article, and other writing in existence on a particular point — and no attorney will conduct research that way if unpublished opinions can be cited. If a point is well-covered by published opinions, an attorney may not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney may look at unpublished opinions, as he or she probably should.

The disparity between litigants who are wealthy and those who are not is an unfortunate reality. Undoubtedly, some litigants have better access to unpublished opinions, just as some litigants have better access to published opinions, statutes, law review articles — or, for that matter, lawyers. The solution to these disparities is not to forbid *all* parties from citing unpublished opinions. After all, parties are not forbidden from citing published opinions, statutes, or law review articles — or from retaining lawyers. Rather, the solution is found in measures such as the E-Government Act, which make unpublished opinions widely available at little or no cost.

In sum, whether or not no-citation rules were ever justifiable as a policy matter, they are no longer justifiable today. To the contrary, they tend to undermine public confidence in the judicial system by leading some litigants — who have difficulty

comprehending why they cannot tell a court that it has addressed the same issue in the past — to suspect that unpublished opinions are being used for improper purposes. They require attorneys to pick through the inconsistent formal no-citation rules and informal practices of the circuits in which they appear and risk being sanctioned or accused of unethical conduct if they make a mistake. And they forbid attorneys from bringing to the court's attention information that might help their client's cause.

Because no-citation rules harm the administration of justice, Rule 32.1 abolishes such rules and requires courts to permit unpublished opinions to be cited.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion must provide a copy of that opinion to the court and to the other parties, unless that opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an opinion must file and serve the copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the unpublished opinions cited in their briefs or other papers. Unpublished opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of unpublished opinions, requiring parties to file and serve copies of every unpublished opinion that they cite is unnecessary and burdensome and is an example of a restriction forbidden by Rule 32.1(a).

3. Changes Made After Publication and Comments

No changes were made to the text of subdivision (b) or to the accompanying Committee Note.

The text of subdivision (a) was changed. The proposed rule, as published, provided that a prohibition or restriction could not be placed upon the citation of unpublished opinions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions." The Committee was trying to accomplish two goals by drafting the rule in this manner: On the one hand, the Committee did not want a court to be able to permit the citation of unpublished opinions as a formal matter, but then, as a practical matter, make such citation nearly impossible by imposing various restrictions on it. On the other hand, the Committee did not want to preclude circuits from imposing general requirements of form or style upon the citation of *all* authorities.

After reflecting on the comments — particularly those of Judge Easterbrook — the Committee concluded that this clause was unnecessary. First, as Judge Easterbrook pointed out, Rule 32(e)** was intended to put the circuits out of the business of imposing general requirements of form or style. It is hard to identify a requirement of form or style that could be both endangered by Rule

---

**Rule 32(e) provides: "Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule."

32.1 and enforced under Rule 32(e). Second, Rule 32.1 is most naturally read as precluding only prohibitions and restrictions on the citation of unpublished opinions *as such* — that is, prohibitions and restrictions aimed *exclusively* at the citation of unpublished opinions. A page limit on a brief could be said indirectly to "restrict" the citation of unpublished opinions, but no one is likely to read Rule 32.1 to forbid page limits on briefs.

For these reasons, the "generally imposed" clause was removed, leaving the rule simply to forbid courts from prohibiting or restricting the citation of unpublished opinions. What remained of the subdivision was also restyled so that it is now stated in the active rather than passive voice. The published version of the rule had been written passively — contrary to style conventions — because some Committee members hoped that a passively written rule would be less controversial. That strategy did not work, and all Committee members now agree that the rule should be written in active voice.

The Committee Note accompanying subdivision (a) has been substantially rewritten. The revised Note reflects the changes made in the text of the rule, states more forcefully the normative case for the rule, and responds directly to the major arguments against the rule. It is admittedly an unusual Note, in that it is almost entirely devoted to defending rather than explaining the rule. Such a Note seems advisable, though, given the controversial nature of proposed Rule 32.1.

4. Summary of Public Comments

As I explained in the introduction to this memorandum, I will not summarize all of the testimony that we received about Rule 32.1, nor will I summarize each of the 513 comments that were submitted. Rather, I will describe the major arguments that witnesses and

commentators made for and against adopting the proposed rule. I will then describe the suggestions that commentators made regarding the wording of Rule 32.1. I will conclude by listing those who commented in favor of and those who commented against adopting the proposed rule.

Please note that Sanford Svetcov, one of two members of the Advisory Committee who oppose Rule 32.1, asked that his dissenting views be communicated to the Standing Committee. A letter from Mr. Svetcov describing his reasons for opposing Rule 32.1 is attached to this memorandum.

a. Summary of Arguments Regarding Substance

i. Arguments Against Adopting Proposed Rule

1. A circuit should be free to conduct its business as it sees fit unless there is a compelling reason to impose uniformity. This is particularly true with respect to measures such as no-citation rules, which reflect decisions made by circuits about how best to allocate their scarce resources to meet the demands placed upon them. Circuits confront dramatically different local conditions. Among the features that vary from circuit to circuit are the size, subject matter, and complexity of the circuit's caseload; the number of active and senior judges on the circuit; the geographical scope of the circuit; the process used by the circuit to decide which cases are designated as unpublished; the time and attention devoted by circuit judges to unpublished opinions; and the legal culture of the circuit (such as the aggressiveness of the local bar). These features are best known to the judges who work within the circuit every day. No advisory committee composed entirely or almost entirely of outsiders should tell a circuit that it cannot implement a rule that the circuit has deemed necessary to handle its workload, unless that advisory

committee has strong evidence that a uniform rule would serve a compelling interest.

2. The Appellate Rules Committee does not have such evidence with respect to Rule 32.1. The Committee Note fails to identify a single serious problem with the status quo that Rule 32.1 would solve.

a. The main problem identified by the Committee Note is that no-citation rules impose a "hardship" on attorneys by forcing them to "pick through the conflicting no-citation rules of the circuits in which they practice."

i. This is not much of a hardship.

— Every circuit has implemented numerous local rules, and attorneys will continue to have to "pick through" those rules whether or not Rule 32.1 is approved. It is not unreasonable to ask an attorney who seeks to practice in a circuit to read and follow that circuit's local rules — local rules that are readily available online.

— Among local rules, no-citation rules are particularly easy to follow, as they are clear and, in most circuits, stamped right on the face of unpublished opinions. A lawyer who reads an unpublished opinion is told up front exactly what use he or she can make of it.

— It is not surprising that the Committee has not identified a single occasion on which an attorney was in fact confused about the no-citation rule of a circuit, much less a single occasion on which an attorney was

"sanctioned or accused of unethical conduct for improperly citing an 'unpublished' opinion." Attorneys have no difficulty locating, understanding, and following no-citation rules.

ii. Rule 32.1 would do little to alleviate whatever hardship exists.

— Most litigators practice in only one state and one circuit. Thus, most litigators are inconvenienced far more by differences between the rules of their *state* courts and the rules of their *federal* courts than they are by differences among the rules of various federal courts. The minority of attorneys who practice regularly in multiple circuits tend to work for the Justice Department or for large law firms and thus have the time and resources to learn and follow each circuit's local rules.

— Although Rule 32.1 would help these Justice Department and big firm lawyers by creating uniformity among federal circuits, it would *harm* the typical attorney who practices in only one state by creating *disuniformity* between, for example, the citation rules of the California courts and the citation rules of the Ninth Circuit.

— Even within the federal courts, Rule 32.1 would create uniformity only with respect to citation. The rule would not create uniformity with respect to the *use* that circuits make of unpublished opinions. Thus, those who practice in multiple federal circuits would

still have to become familiar with inconsistent rules about unpublished opinions.

iii. If uniformity is the Committee's concern, it would be far better, for the reasons described below, for the Committee to propose a rule that would uniformly *bar* the citation of unpublished opinions.

b. The Committee Note alludes to a potential First Amendment problem. No court has found that no-citation rules violate the First Amendment, and no court will. Courts impose myriad restrictions on what an attorney may say to a court and how an attorney may say it. A no-citation rule no more threatens First Amendment values than does a rule limiting the size of briefs to 30 pages.

3. Not only has the Committee failed to identify any problems that Rule 32.1 would solve, it has failed to identify any other benefits that would result from Rule 32.1.

a. Rule 32.1 would not, as the Committee Note claims, "expand[] the sources of insight and information that can be brought to the attention of judges." Unpublished opinions provide little "insight" or "information" to anyone; to the contrary, they are most often used to mislead.

i. To understand why unpublished opinions do not provide much "insight" or "information," one needs to appreciate when and how unpublished opinions are produced.

— Appellate courts have essentially two functions: error correction and law creation. Unpublished opinions

are issued in the vast majority of cases that call upon a court only to perform the former function.

— Unpublished opinions merely inform the parties and the lower court of why the court of appeals concluded that the lower court did or did not err. Unpublished opinions do not establish a new rule of law; expand, narrow, or clarify an existing rule of law; apply an existing rule of law to facts that are significantly different from the facts presented in published opinions; create or resolve a conflict in the law; or address a legal issue in which the public has a significant interest. As one judge wrote: "[O]ur uncitable memorandum dispositions do nothing more than apply settled circuit law to the facts and circumstances of an individual case. They do *not* make or alter or nuance the law. The principles we use to decide cases in memorandum dispositions are already on the books and fully citable." [03-AP-129]

— Unpublished opinions are also issued in cases that *do* present important legal questions, but in which the court is not confident that it answered those questions correctly — most often because the facts were unusual or because the advocacy was poor or lopsided. In such circumstances, a court may not want to speak authoritatively or comprehensively about an issue — or foreclose a particular line of argument — when a future case may present more representative facts or more skilled advocacy.

— Because an unpublished opinion functions solely as a one-time explanation to the parties and the lower

court, judges are careful to make sure that the result is correct, but they spend very little time reviewing the opinion itself. Usually the opinion is drafted by a member of the circuit's staff or by a law clerk; often, the staff member or law clerk simply converts a bench memo into an opinion. The opinion will generally say almost nothing about the facts, because its intended audience — the parties and the lower court -- are already familiar with the facts. It is common for a panel to spend as little as five or ten minutes on an unpublished opinion. The opinions usually do not go through multiple drafts, members of the panel usually do not request modifications, and the opinions are not usually circulated to the entire circuit before they are released.

— An unpublished opinion may accurately express the views of *none* of the members of the panel. As long as the result is correct, judges do not care much about the language. As one judge explained: "What matters is the result, not the precise language of the disposition or even its reasoning. Mem dispos reflect the panel's agreement on the outcome of the case, nothing more." [03-AP-075]

ii. Because of these features, citing unpublished opinions will not only provide little "insight" or "information," but will actually result in judges being *misled.*

— Unpublished opinions are poor sources of law. A court's holding in any case cannot be understood outside of the factual context, but unpublished opinions say little or nothing about the facts (because

they are written for those already familiar with the case). Thus, it is difficult to discern what an unpublished opinion held.

— Because unpublished opinions are hurriedly drafted by staff and clerks, and because they receive little attention from judges, they often contain statements of law that are imprecise or inaccurate. Even slight variations in the way that a legal principle is stated can have significant consequences. If unpublished opinions could be cited, courts would often be led to believe that the law had been changed in some way by an unpublished opinion, when no such change was intended.

— Unpublished opinions are also a poor source of information about a judge's views on a legal issue. As noted, it is possible that an unpublished opinion does not accurately express the views of any judge. Citing unpublished opinions might mislead lower courts and others about the views of a circuit's judges.

iii. Even in the rare case in which an unpublished opinion might be persuasive "by virtue of the thoroughness of its research or the persuasiveness of its reasoning," Rule 32.1 is not needed.

— First, any party can petition a court of appeals to publish an opinion that has been designated as unpublished. Courts recognize that they sometimes err in designating opinions as unpublished and are quite willing to correct those mistakes when those mistakes are brought to their attention.

— Second, and more importantly, nothing prevents any party in any case from borrowing — word-for-word, if the party wishes — the "research" and "reasoning" of an unpublished opinion. Parties want to cite unpublished opinions not because they are inherently persuasive, but because parties want to argue (explicitly or implicitly) that a panel of the circuit *agreed* with a particular argument — and for *that* reason, and not because of the opinion's "research" or "reasoning," the circuit should agree with the argument again. As one judge commented: "[N]othing prevents a party from copying wholesale the thorough research or persuasive reasoning of an unpublished disposition — without citation. But that's not what the party seeking to actually cite the disposition wants to do at all; rather, it wants the added boost of claiming that *three court of appeals judges endorse that reasoning*." [03-AP-169]

This, however, is a dishonest and misleading use of unpublished opinions. As described, judges often sign off on unpublished opinions that do not accurately express their views; indeed, it will be the rare unpublished opinion that will precisely and comprehensively describe the views of any of the panel's judges.

iv. In short, no-citation rules merely prevent parties from using unpublished opinions illegitimately — to *mislead* a court. All legitimate uses of unpublished opinions — such as mining them for nuggets of research or reasoning — are already available to parties.

b. Rule 32.1 would not, as the Committee Note claims, "mak[e] the entire process more transparent to attorneys, parties, and the general public."

i. As the Committee Note itself describes, unpublished opinions are already widely available and widely read by judges, attorneys, parties, and the general public — and sometimes reviewed by the Supreme Court. Those opinions can be requested from the clerk, reviewed on the websites of the circuits and other free Internet sites, and researched with Westlaw and Lexis. Unpublished opinions are no less "transparent" than published opinions. They are not hidden from anyone.

ii. Although proponents of Rule 32.1 often cite suspicions that courts use unpublished opinions to duck difficult issues or to hide decisions that are contrary to law, there is no evidence whatsoever that these suspicions are valid. Even those (very few) judges who have expressed support for Rule 32.1 have cited only the *perception* that unpublished opinions are used improperly; they agree that the perception is not accurate. Since the Ninth Circuit changed its no-citation rule to allow parties to bring to the court's attention in a rehearing petition any unpublished opinions that were in conflict with the decision of the panel, almost no parties have been able to do so. Every judge makes mistakes, but there is no evidence that judges are intentionally and systematically using unpublished opinions for improper purposes.

4. Although Rule 32.1 would not address any real problem with the status quo — and although Rule 32.1 would not result in any real benefit — Rule 32.1 would inflict enormous costs on judges, attorneys, and parties.

a. Judges

i. The judges of many circuits are now overwhelmed. The number of appeals filed has increased dramatically faster than the number of authorized judgeships, and Congress has been slow to fill judicial vacancies. Judges and their staffs are already stretched to the limit; there is no "margin for error" when it comes to imposing new responsibilities on them.

ii. Drafting published opinions takes a lot of time. Because judges know that such opinions will bind future panels and lower courts — and because judges know that those opinions will be widely cited as reflecting the views of the judges who write or join them — published opinions are drafted with painstaking care. A published opinion provides extensive information about the facts and the procedural background, because it is written for strangers to the case, and because those strangers will not be able to identify its precise holding without such information. The author of a published opinion will devote dozens (sometimes hundreds) of hours to writing, editing, and polishing multiple drafts. Although law clerks may help with the research or produce a first draft, the authoring judge will invest a great deal of his or her own time into drafting the opinion. The final draft will be reviewed carefully by the other members of the panel, who will often request revisions. Before the opinion is released, it will be circulated to all of the members of the court, and other judges will sometimes request changes.

iii. By contrast, as described above, unpublished opinions generally take very little time. They are written quickly by court staff or law clerks, and judges give them only cursory attention — precisely because judges know that the opinions need to function only as explanations to those involved in the cases and will not be cited to future panels or to lower courts within the circuit.

iv. Rule 32.1 would force judges to spend much more time writing unpublished opinions just to make them suitable to be cited as persuasive authority. Judges will also take the time to write concurring and dissenting opinions, to prevent courts from misunderstanding their views. The Committee cannot:

— change the *audience* for unpublished opinions (from the parties, their attorneys, and the lower court under the current system to future panels, district courts within the circuit, and the rest of the world under Rule 32.1), and

— change the *purpose* of unpublished opinions (from giving a brief, one-time explanation to those already familiar with the case under the current system to being used forever to persuade courts to rule a particular way under Rule 32.1), and *not*

— not change the *nature* of unpublished opinions.

As one judge commented, "[the] efficiency [of unpublished opinions] is made possible only when the authoring judge has confidence that short-hand statements, clearly understood by the parties, will not later be scrutinized for their legal significance by a panel not privy to the specifics of the case at hand." [03-AP-329]

v. Because judges will spend much more time writing unpublished opinions, at least two consequences will follow:

— Judges will have less time available to devote to published decisions — the decisions that really matter. The quality of published opinions will suffer. The law will be less clear. Apparent inconsistencies

will abound. Inadvertent intra- and inter-circuit conflicts will arise more frequently. All of this will result in more litigation, more appeals, and more en banc proceedings, which will result in even more demands on judges, which will give them even less time to devote to writing published opinions.

— Parties will have to wait much longer to get unpublished decisions. Parties now often get an unpublished decision in a few days; under Rule 32.1, they may have to wait for a year or more.

vi. Although Rule 32.1 will reduce the time that judges have available to spend on opinions, it will increase the amount of attention that drafting opinions will require.

— Parties will cite more cases to the courts, meaning that conscientious judges and their law clerks will have more opinions to read, explain, and distinguish in the course of writing opinions. As one judge wrote: "Once brought to the court's attention, . . . there is no way simply to ignore our memorandum dispositions." [03-AP-285]

— This will be a time-consuming process, because to fully understand an unpublished opinion — which, as described above, will usually say little about the facts — the judge or the law clerk will have to go back and read the briefs and record in the case.

— The result will be that parties — who now often wait a year or more to get a published decision — will have to wait even longer.

vii. Of course, Rule 32.1 can't change the fact that there are only 24 hours in a day. Judges are already stretched to the limit. If they have to spend more time on both published and unpublished opinions, they will have to compensate in some way. One way that judges will compensate is by issuing *no* opinion in an increasing number of cases — i.e., by disposing of an increasing number of cases with one-line orders.

— One-line dispositions are unfair to the parties, who are entitled to some explanation of why they won or lost an appeal, as well as to some assurance that their arguments were read, understood, and taken seriously. Parties who are not told why they won or lost an appeal — and who are not provided with any evidence that their arguments were even read — will lose confidence in the judicial system.

— One-line dispositions are unfair to lower court judges, who are entitled to know why they have been affirmed or reversed. Lower court judges cannot correct their mistakes unless those mistakes are made known to them.

— One-line dispositions deprive parties of a meaningful chance to petition for en banc reconsideration by the circuit or certiorari from the Supreme Court. Without any explanation of the panel's decision, it is almost impossible for the en banc court or the Supreme Court to know if a case is worth further review.

— When judges issue an unpublished opinion, they have to discuss the basic rationale for the

disposition. That provides at least some discipline. That discipline is completely lacking when a panel issues a one-line disposition.

b. Attorneys

i. Critics of no-citation rules represent only a small fraction of the bar — although, because they are very vocal, they have created the illusion that there is widespread dissatisfaction with such rules. In fact, most lawyers support no-citation rules, and for good reason.

ii. Abolishing no-citation rules would vastly increase the body of case law that would have to be researched. If unpublished opinions can be cited, then they might influence the court; and if unpublished opinions might influence the court, then an attorney must research them. As one oft-repeated "talking point" put it: "As a matter of prudence, and probably professional ethics, practitioners could not ignore relevant opinions decided by the very circuit court before which they are now litigating." [03-AP-025]

iii. Even an attorney who understands that unpublished opinions are largely useless and who does not want to waste time researching them will have to prepare for the possibility that his or her opponent will use them. One way or another, attorneys will have to read unpublished opinions.

iv. An attorney will be faced with a difficult dilemma when he or she runs across an unpublished opinion that is contrary to his or her position. Even if unpublished opinions are formally treated as non-binding, "the advocate is faced with the Hobson's choice of either using up precious pages in her brief distinguishing the unpublished decisions, or running the uncertain risk of condemnation

from her opponent (or worse, the court) for ignoring those decisions. In other words, even if it were possible to maintain some sort of *formal* distinction between permissively citable unpublished decisions and mandatory, precedential published opinions, the *substance* of the distinction would quickly erode." [03-AP-462]

v. The hardship imposed on attorneys is not just a function of the dramatic increase in the *number* of opinions that they will have to read; it is also a function of the *nature* of those opinions. Because unpublished opinions say so little about the facts, attorneys will struggle to understand them. Attorneys will often have to retrieve the briefs or records of old cases to be certain that they understand what unpublished opinions held.

vi. Attorneys already find it almost impossible to keep current on the law — even the law in one or two specialities. So many courts are publishing so many opinions — and there are so many ambiguities and inconsistencies in those opinions — that it is often very difficult for a conscientious attorney to know what the law "is" on a particular question. Rule 32.1 will compound this problem many times over, not only because the number of opinions that will "matter" will multiply, but because the unpublished opinions that will have to be consulted are "a particularly watery form of precedent." [03-AP-169] Because so little time goes into writing them, unpublished opinions will introduce into the corpus of the law thousands of ambiguous, imprecise, and misleading statements that will be represented as the "holdings" of circuits.

vii. Litigators are not the only attorneys who will be burdened by Rule 32.1. Transactional attorneys and others who counsel clients about how to structure their affairs will have more opinions to read and, because more law means more uncertainty, will have difficulty advising their clients about the legal implications of

their conduct. This problem will be particularly acute for attorneys who must advise large corporations and other organizations that operate in multiple jurisdictions.

viii. While all attorneys — litigators and non-litigators — will be harmed by Rule 32.1, some will be harmed more than others.

— Unpublished opinions are not as readily available as published opinions. Not all libraries and legal offices can afford to purchase the Federal Appendix and rent space to store it. And not all lawyers can afford to use Westlaw or Lexis. (Indeed, not all attorneys have access to computers.) The E-Government Act will help, but it will not level the playing field entirely. For example, the Act will not require circuits to provide electronic access to their *old* unpublished decisions, and it is unlikely that researching unpublished opinions on circuit websites will be as easy as researching those opinions on Westlaw or Lexis.

— Even if the day arrives when unpublished opinions become equally available to all, attorneys will still have to *read* them. Some attorneys are already overwhelmed with work or have clients who cannot pay for more of their time. These attorneys — including solo practitioners, small firm lawyers, public defenders, and CJA-appointed counsel — will bear the brunt of Rule 32.1. Rule 32.1 will thus increase the already substantial advantage enjoyed by large firms, government attorneys, and in-house counsel at large corporations.

c. Parties

i. As described above, all parties in all cases — both those that terminate in published opinions and those that terminate in unpublished opinions — will have to wait longer for their cases to be resolved. Delays are bad for everyone, but they are particularly harmful for the most vulnerable litigants — such as plaintiffs in personal injury cases who can no longer pay their medical bills or habeas petitioners who are unlawfully incarcerated.

ii. As described above, Rule 32.1 will result in more one-line dispositions. More parties will never be given an explanation for why they lost their appeal or even assurance that their arguments were taken seriously. This will result in *less* transparency and *less* confidence in the judicial system.

iii. As described above, Rule 32.1 will increase the already high cost of litigation. Clients will have to pay more attorneys to read more cases.

iv. Increasing the cost of litigation will, of course, harm the poor and middle class the most, adding to the already considerable advantages enjoyed by the powerful and the wealthy.

v. Rule 32.1 will particularly disadvantage pro se litigants and prisoners, who often do not have access to the Internet or to the Federal Appendix.

5. Rule 32.1 could harm state courts. For example, the rule would permit litigants to cite and federal courts to rely upon the unpublished opinions of the California *state* courts in diversity and other actions, even though the California courts themselves have determined that these cases should not be looked to for expositions of state law. This, in turn, will enable litigants to use the unpublished decisions of the California state courts to influence the development of California law, through the "back door" of the federal courts. Thus, many of the costs imposed by Rule 32.1 on federal courts --

such as the need for judges to spend more time writing unpublished opinions — will also be imposed on state courts.

6. The assurances provided in the Committee Note that Rule 32.1 will not inflict the costs described above are unpersuasive.

a. The Committee Note admits that Rule 32.1 would inflict substantial costs of the type described above if it required courts to treat their unpublished opinions as binding precedent, but then gives assurance that Rule 32.1 does not do so. The Committee is naive in believe that a clear distinction between "precedential" and "non-precedential" will be maintained.

i. As noted, parties will be citing unpublished opinions precisely for their precedential value — that is, as part of an argument (implicit or explicit) that because a panel of a circuit decided an issue one way in the past, the circuit should decide the issue the same way now. The only real interest that proponents of Rule 32.1 have in citing unpublished opinions is as precedent.

ii. When circuits are confronted with this argument, they will not be able to say simply that the prior unpublished opinion is not binding precedent and therefore can be ignored. Rather, the court will have to distinguish it or explain why it will not be followed. As one group of judges commented: "As a practical matter, we expect that [unpublished opinions] will be accorded significant precedential effect, simply because the judges of a court will be naturally reluctant to repudiate or ignore previous decisions." [03-AP-396] From the point of view of the court's workload, then, the Committee Note's assurance that courts will not have to treat their unpublished opinions as binding precedent will make little difference.

iii. This phenomenon will be even more apparent in the lower courts. It will be a rare district court judge who will ignore an unpublished opinion of the circuit that will review his or her decision. If unpublished opinions are cited to lower courts, lower courts will have to treat them as though they were binding, even if that is not technically true.

iv. In sum, all of the consequences described above — such as courts having to spend more time writing unpublished opinions and attorneys having to spend more time researching them — will occur, whether or not the unpublished opinions are labeled "non-binding."

b. The Committee Note's argument that there is no compelling reason to treat unpublished opinions different than such sources as district court opinions, law review articles, newspaper columns, or Shakespearian sonnets misses a few important distinctions:

i. The fact that law review articles or newspaper columns can be cited in a brief will not have any effect on the *author* of such materials. The author of a law review article or a newspaper column is going to do precisely the same amount of work — and write precisely the same words — whether or not his or her work can later be cited to a court. By contrast, making the unpublished opinions of a court of appeals citable *will* affect their authors, as described above.

ii. There is no chance that law review articles or newspaper columns will be cited by parties for their precedential value — that is, as part of an argument that, because a circuit did x once, it should do x again. Law review articles, newspaper columns, and the like are cited *only* for their persuasive value because that is the only value they have. An unpublished opinion, by contrast, is cited by a party who wants a future panel of the circuit or a lower court within the circuit to decide an issue a particular way — not because the unpublished opinion, like a law review article, is powerfully persuasive, but because the unpublished opinion, unlike the law review article, was at least nominally issued in the name of the circuit.

iii. The same point can be made about the opinions of other circuits, lower federal courts, state courts, or foreign jurisdictions. As one commentator wrote:

> "When the opinions, even the unpublished ones, of another court are cited, the underlying argument is as follows: the other court accepted or advanced a particular reasoning and, therefore, this court should too — it can, and should, trust the other court's judgment. When an unpublished opinion of the

same court is cited, however, the underlying argument is invariably a precedential one, in the most basic sense: this court accepted or advanced a particular reasoning in another case and, therefore, it would be fundamentally unfair not to apply that same rationale in the instant case. Such opinions *are* cited for their precedential value." [03-AP-478]

iv. There is also no chance that a lower court will feel bound to adhere to the views of the author of a law review article or newspaper column. As one judge wrote, "Shakespearian sonnets, advertising jingles and newspaper columns are not, and cannot be mistaken for, expressions of the law of the circuit. Thus, there is no risk that they will be given weight far disproportionate to their intrinsic value." [03-AP-169] Or, as one bar committee wrote, "unlike unpublished decisions, there is no risk these other materials will be mistaken for the law of the circuit or given undue weight by the lower courts or litigants." [03-AP-319]

v. According to commentators, this risk is particularly acute in the lower courts, which is why some no-citation rules apply to those courts, as well as to parties. "The word of a federal Court of Appeals will not be treated as a law review article or newspaper column, no matter how many admonitions from the appellate court that its unpublished opinions have no precedential authority. Every judge and lawyer in America has internalized the hierarchical nature of our justice system; the word of a federal Court of Appeals, even unpublished, will not be treated the same as the word of a legal scholar or newspaper columnist." [03-AP-322]

c. The Committee Note is wrong in suggesting that, because some circuits have liberalized no-citation rules without experiencing problems, the concerns about Rule 32.1 are overblown.

i. The conditions of each circuit vary significantly, making it hazardous to assume that the experience of one circuit will be duplicated in another. As noted above, circuits vary with respect to such things as the size, subject matter, and complexity of the caseload; the number of judges; and the local legal culture. Just because the Fifth Circuit is able to permit the citation of unpublished opinions does not mean that the Ninth Circuit can do so.

ii. No circuit has gone as far as Rule 32.1 would in permitting the citation of unpublished opinions. All circuits

discourage such citation, forbid it in some circumstances, or both. And three circuits with relatively liberal citation rules — the Third, Fifth, and Eleventh -- either do not make or have only recently made their unpublished opinions widely available. It is virtually costless for a circuit whose unpublished opinions do not appear in the Federal Appendix or in the Westlaw and Lexis databases to allow those opinions to be cited.

iii. Some circuits that have liberalized no-citation rules have done so only recently, so it is too early to know whether they will experience difficulties.

iv. Some of the circuits that permit liberal citation of unpublished opinions also make frequent use of one-line dispositions. This supports — rather than refutes — the arguments of those who oppose Rule 32.1.

7. Rule 32.1 is not a "general rule[] of practice and procedure" because, if Rule 32.1 is adopted, "some judges will make the opinion more elaborate in order to make clear the context of the ruling, while other judges will shorten the opinion in order to provide less citable material." Because Rule 32.1 would "affect the construction and import of opinions," the rule is "beyond the scope of the rulemaking authority of 28 U.S.C. § 2072." [03-AP-329]

8. If, despite all of these arguments, the Committee decides to forge ahead with Rule 32.1, it should at least amend the rule so that it applies only prospectively — that is, so that it applies only to unpublished decisions issued after the rule's effective date. It is unfair to allow citation of opinions that judges wrote under the assumption that they would never be cited. The D.C. Circuit's decision to abolish its no-citation rule was applied prospectively only; the Committee should follow the D.C. Circuit's lead.

ii. Arguments For Adopting Proposed Rule

1. It is not Rule 32.1, but no-citation rules, that require a compelling justification. In a democracy, the presumption is that citizens may discuss with the government the actions that the government has taken. Under the First Amendment, the presumption is that prior restraints of speech — especially speech *about* the government made *to* the government — are invalid. In a common law system, the presumption is that judicial decisions are citable. In

an adversary system, the presumption is that lawyers are free to make the best arguments available. No-citation rules — through which judges instruct litigants, "You may not even *mention* what we've done in the past, much less engage us in a discussion about whether what we've done in the past should influence what we do in this case" — are profoundly antithetical to American values. The burden should not be on the Committee to defend Rule 32.1 but on opponents of Rule 32.1 to defend no-citation rules.

2. The main problem created by no-citation rules — a problem that Rule 32.1 would eliminate — is that no-citation rules deprive the courts, attorneys, and parties of the use of unpublished opinions. The evidence is overwhelming that unpublished opinions are indeed a valuable source of "insight" and "information."

a. First, unpublished opinions are often read. "[L]awyers, district court judges, and appellate judges regularly read and rely on unpublished decisions despite prohibitions on doing so." [03-AP-406] Numerous commentators — supporters and opponents of Rule 32.1 alike — said that they regularly read unpublished opinions.

b. Second, unpublished opinions are often cited by attorneys. One commentator wrote: "My own experience has been that the prohibition on [citation] currently in effect in the lower courts of the Ninth Circuit is utterly disregarded, not just by bad lawyers but also by good ones — even by leading lawyers, not always, to be sure, but in many cases when there is no binding, published authority available." [03-AP-473]

c. Third, unpublished decisions are often cited by judges. Researchers have identified hundreds of citations to unpublished opinions by appellate courts and district courts — including appellate courts and district courts in jurisdictions that have adopted no-citation rules. One of the most pointed of those citations appears in *Harris v. United Federation of Teachers*, No. 02-Civ. 3257 (GEL), 2002 WL 1880391, at *1 n.2 (S.D.N.Y. Aug. 14, 2002):

> "There is apparently no published Second Circuit authority directly on point for the proposition that § 301 does not confer jurisdiction over fair representation suits against public employee unions. In the 'unpublished' opinion in *Corredor*, which of course is published to the world on both the Lexis and Westlaw services, the Court expressly decides the point

> . . . . Yet the Second Circuit continues to adhere to its technological-outdated rule prohibiting parties from citing such decisions . . . thus pretending that this decision never happened and that it remains free to decide an identical case in the opposite manner because it remains unbound by this precedent. This Court nevertheless finds the opinion of a distinguished Second Circuit panel highly persuasive, at least as worthy of citation as law review student notes, and eminently predictive of how the Court would in fact decide a future case such as this one."

d. Fourth, there are some areas of the law in which unpublished opinions are particularly valuable. One appellate judge, after describing a recent occasion on which a staff attorney had cited many unpublished decisions in advising a panel of judges about how to dispose of a case, commented as follows:

> "Judges rely on this material for one reason; it is helpful. For instance, unpublished orders often address recurring issues of adjective law rarely covered in published opinions. . . . We have all encountered the situation in which there is no precedent in our own circuit, but research reveals that colleagues in other circuits have written on the issue, albeit in an unpublished order. I see no reason why we ought not be allowed to consider such material, and I certainly do not understand why counsel, obligated to present the best possible case for his client, should be denied the right to comment on legal material in the public domain." [03-AP-335]

e. Fifth, unpublished opinions can be particularly helpful to district court judges, who so often must exercise discretion in applying relatively settled law to an infinite variety of facts. For example, district courts are instructed to strive for uniformity in sentencing, and thus they are often anxious for *any* evidence about how similarly situated defendants are being treated by other judges. Many unpublished opinions provide this information. The value of unpublished opinions to district court judges may explain why only 4 of the 1000-plus active and senior district judges in the United States — including only 2 of the 150-plus district judges in the Ninth Circuit — submitted comments opposing Rule 32.1.

f. Sixth, there is not already "too much law," as some opponents of Rule 32.1 claim. As one distinguished federal appellate

judge wrote in one of his books: "Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are too few on point."*** Attorneys are most likely to cite -- and judges are most likely to consult — an unpublished opinion not because it contains a sweeping statement of law (a statement that can be found in countless published opinions), but because the facts of the case are very similar to the facts of the case before the court. Parties should be able to bring such factually-similar cases to a court's attention, and courts should be able to consult them for what they are worth.

g. For all of these reasons, no-citation rules should be abolished. When attorneys can and do read unpublished opinions — and when judges can and do get influenced by unpublished opinions — it makes no sense to prohibit attorneys and judges from talking about the opinions that both are reading.

3. In addition to the evidence that unpublished opinions do indeed often serve as sources of "insight" and "information" for both attorneys and judges, there are other reasons to doubt the oft-repeated claim that unpublished opinions merely apply settled law to routine facts and therefore have no precedential value:

a. It is difficult for a court to predict whether a case will have precedential value. "Only when a case comes along with arguably comparable facts does the precedential relevance of an earlier decision-with-opinion arise. This point naturally leads one to question how an appellate panel can, ex ante, determine the precedential significance of its ruling. Lacking omniscience, an appellate panel cannot predict what may come before its court in future days." [03-AP-435] As one attorney commented: "[W]e can and do expect a lot from our judges, but the assumption that *any court* can know, at the time of issuing a decision, that the decision neither adds (whatsoever) to already existing case law and that it could *never* contribute (in any way) to future development of the law, strikes me as hero-worship taken beyond the cusp of reality." [03-AP-454]

***Richard A. Posner, The Federal Courts: Challenge and Reform 166 (1996). I should note that Judge Posner opposes Rule 32.1.

b. Even if a court could reliably predict whether an opinion establishes a precedent worth being cited, making that decision would *itself* take a lot of time. "The very choice of treating an appealed case as non-precedential, if done conscientiously, has to be preceded by thoughtful analysis of the relevant precedents." [03-AP-435] Time, of course, is precisely what courts who issue unpublished opinions say they do not have.

c. Given these limitations, it is not surprising that courts often designate as "unpublished" decisions that should be citable. The most famous example involves the Fourth Circuit's declaring an Act of Congress unconstitutional in an unpublished opinion — something that the Supreme Court labeled "remarkable and unusual." *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 425 n.3 (1993). Other examples abound. For example, in *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000), the court described how 20 inconsistent unpublished opinions on the same unresolved and difficult question of law had been issued by Ninth Circuit panels before a citable decision settled the issue.

d. More evidence of the unreliability of these designations can be found in the many unpublished decisions that have been reviewed by the Supreme Court. (A recent example is *Muhammad v. Close*, 124 S. Ct. 1303, 1306 (2004), in which the Supreme Court reversed an unpublished decision that "was flawed as a matter of fact" — suggesting that the facts were neither clear nor straightforward — "and as a matter of law" — because the opinion took what the Supreme Court regarded as the wrong side of a circuit split.) The fact that the Supreme Court decides to review a case does not necessarily mean that the circuit made a mistake in designating the opinion as unpublished, but the fact that an opinion was deemed "certworthy" by the Supreme Court does suggest that *something* worthy of being cited may have occurred in that opinion.

e. Many unpublished opinions reverse the decisions of district courts or are accompanied by concurrences or dissents — implying that their results may not be clear or uncontroversial.

f. Researchers who have studied unpublished opinions have found that the decision to designate an opinion as unpublished is influenced by factors other than the novelty or complexity of the issues. For example, the background of judges plays a role. The more experience that a judge had with an area of law in practice, the

less likely the judge is to publish opinions in that area (which, ironically, means that citable opinions in that area will disproportionately be published by the judges who know the least about it).

4. Even if, despite all of this evidence, it remains unclear whether unpublished opinions offer much insight or information, Rule 32.1 has a major advantage over no-citation rules: It lets the "market" function and determine the value of unpublished opinions.

a. A glaring inconsistency runs through the arguments of the opponents of Rule 32.1. On the one hand, they argue that unpublished opinions contain nothing of value — that such opinions are useless, fact-free, poorly-worded, hastily-converted bench memos written by 26-year-old law clerks. On the other hand, they argue that, if Rule 32.1 is approved, attorneys will be devoting thousands of hours to researching these worthless opinions, briefs will be crammed with citations to these worthless opinions, district courts will feel compelled to follow these worthless opinions, and circuit judges will have no alternative but to carefully analyze and distinguish these worthless opinions.

b. Opponents of Rule 32.1 can't have it both ways. Either (i) unpublished opinions contain something of value, in which case parties *should* be able to cite them, or (ii) unpublished opinions contain nothing of value, in which case parties *won't* cite them.

c. Under no-citation rules, judges make this decision; they bar the citation of unpublished decisions. If they're wrong in their assessment, the "market" cannot correct them because there is no "market." Under Rule 32.1, the "market" makes this decision. Unpublished opinions will be cited if they are valuable, and they will not be cited if they are not valuable.

5. No-citation rules create several other problems — problems that Rule 32.1 would eliminate:

a. No-citation rules lead to arbitrariness and injustice. Our common law system is founded on the notion that like cases should be decided in a like manner. It helps no one — not judges, not attorneys, not parties — when attorneys are forbidden even to *tell* a court how it decided a similar case in the past. Such a practice can only increase the chances that like cases will not be treated alike.

b. No-citation rules undermine accountability. It is striking that judges opposing Rule 32.1 have argued, in essence: "If parties could tell us what we've done, we'd feel morally obliged to justify ourselves. Therefore, we are going to forbid parties from telling us what we've done." Put differently, judges opposing Rule 32.1 have insisted on the right to decide *x* in one case and "not *x*" in another case and not even be asked to reconcile the seemingly inconsistent decisions. Judges always have the right to explain or distinguish their past decisions or to honestly and openly change their minds. But judges should not have the right to forbid parties from mentioning their past decisions. As one judge wrote: "Public accountability requires that we not be immune from criticism; allowing the bar to render that criticism in their submissions to us is one of the most effective ways to ensure that we give each case the attention that it deserves." [03-AP-335]

c. No-citation rules undermine confidence in the judicial system.

i. No-citation rules make absolutely no sense to non-lawyers. It is almost impossible to explain to a client why a court will not allow his or her lawyer to mention that the court has addressed the same issue in the past — or applied the same law to a similar set of facts. Clients just don't get it.

ii. Because no-citation rules are so difficult for the average citizen to understand, they create the appearance that courts have something to hide — that unpublished opinions are being used for improper purposes. As one judge wrote:

> "It is hard for courts to insist that lawyers pretend that a large body of decisions, readily indexed and searched, does not exist. Lawyers can cite everything from decisions of the Supreme Court to 'revised and extended remarks' inserted into the Congressional Record to op-ed pieces in local newspapers; why should the 'unpublished' judicial orders be the only matter off limits to citation and argument? It implies judges have something to hide.
>
> "In some corners, there is a perception that they do — that unpublished orders are used to sweep under the rug departures from precedent. [This judge is confident that, at least in his circuit, unpublished opinions are not used improperly.] Still,

to the extent that . . . the bar *believes* that this occurs, whether it does or not . . . allowing citation serves a salutary purpose and reinforces public confidence in the administration of justice." [03-AP-367]

iii. No-citation rules also give rise to the appearance — if not the reality — of two classes of justice: high-quality justice for wealthy parties represented by big law firms, and low-quality justice for "no-name appellants represented by no-name attorneys." [03-AP-408]

— Large institutional litigants — and the big firms that represent them — disproportionately receive careful attention to their briefs, oral argument, and a published decision written by a judge. Others — including the poor and the middle class, prisoners, and pro se litigants — disproportionately receive a quick skim of their briefs, no oral argument, and an unpublished decision copied out of a bench memo by a clerk.

— Defenders of no-citation rules insist that, although judges pay little attention to the language of unpublished opinions, they are careful to ensure that the results are correct. The problem with this argument is that it "assumes that reasoning and writing are not linked, that is, that clarity characterizes the panel's thinking about the proper decisional rule, but writing out that clear thinking is too burdensome." [03-AP-435] As every judge who has had the experience of finding that an initial decision just "won't write" — and that is every judge — it is manifestly untrue that reasoning and writing can be separated. One judge put it this way: "There is . . . a wholesome, and perhaps necessary, discipline in our ensuring that unpublished orders can be cited to the courts. . . . [R]elegating this material to non-citable status is an invitation toward mediocrity in decisionmaking and the maintenance of a subclass of cases that often do not get equal treatment with the cases in which a published decision is rendered." [03-AP-335]

d. The inconsistent local rules among circuits do indeed create a hardship for attorneys who practice in more than one circuit — a hardship that opponents of Rule 32.1 too quickly dismiss.

i. The suggestion of some opponents of Rule 32.1 that the Committee is insincere in its concern for the impact of inconsistent local rules on those who practice in more than one circuit is belied by the fact that perhaps no problem has been the focus of more of the Advisory Committee's and Standing Committee's attention over the past few years. The Appellate Rules have been amended several times — most recently in 2002 — to eliminate variations in local rules. Rule 32.1 and other of the rules published in August 2003 would do the same. The Advisory Committee and the Standing Committee believe strongly that an attorney should be able to file an appeal in a circuit without having to read and follow dozens of pages of local rules.

ii. Inconsistent local rules can only be eliminated one at a time. Any rule that makes federal appellate practice more uniform by eliminating one set of inconsistent local rules is obviously going to leave other inconsistent local rules untouched. That is not an excuse for opposing the rule.

e. Opponents of Rule 32.1 have also been too quick to dismiss the First Amendment problems posed by no-citation rules.

i. No-citation rules offend First Amendment values — if not the First Amendment itself — in banning truthful speech about a matter of public concern — indeed, about a governmental action that is in the public domain. They also offend First Amendment values in forbidding an attorney from making a particular type of argument in support of his or her client — a type of argument that is forbidden, at least in part, because it would put the court to the inconvenience of having to defend, explain, or distinguish one of its own prior actions. What the Supreme Court said in *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 544-45 (2001), about restrictions that Congress had placed on legal services attorneys could be said about the restrictions that no-citation rules place on all attorneys:

> "Restricting LSC attorneys in . . . presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys. . . . An informed, independent judiciary presumes an informed, independent bar. . . . By

seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power."

ii. No-citation rules are not like limits on the size of briefs. They differ in the character of the restriction and in the interest purportedly being served by the restriction. A 30-page limit on briefs does not forbid an attorney from making a particular argument or citing a particular action of the court, and page limits — which every court in America imposes — are necessary if courts are to function. No-citation rules, by contrast, forbid particular arguments (arguments that ask a court to follow one of its prior unpublished decisions), are imposed by only some courts, and are imposed by courts in order to protect themselves from having to take responsibility for their prior actions.

6. In opposing Rule 32.1, commentators offer a "parade of horribles" that they claim will be suffered by judges, attorneys, and parties if no-citation rules are abolished.

a. Many of the "horribles" in this parade are the same "horribles" that were paraded out when unpublished opinions became available on Westlaw and Lexis — and then again when unpublished opinions started being published in the Federal Appendix. None of the predictions was accurate.

b. The predictions regarding Rule 32.1 are no more reliable. Dozens of state and federal courts have already liberalized or abolished no-citation rules, and there is absolutely no evidence that the dire predictions of Rule 32.1's opponents have been realized in those jurisdictions. There is no evidence, for example, that judges are spending more time writing unpublished opinions or that attorneys are bombarding courts with citations to unpublished opinions or that legal bills have skyrocketed for clients. While it is true that there are differences among circuits, the circuits that permit citation are similar enough to the circuits that forbid citation that there should be *some* evidence that liberal citation rules cause harm, and yet no such evidence exists.

c. It is no accident that most of the opposition to permitting citation to unpublished opinions comes from judges and attorneys who have no experience permitting citation to unpublished opinions.

It is likewise no accident that little opposition to Rule 32.1 was heard from the judges and attorneys who have such experience. As one judge commented: "What *would* matter are adverse effects and adverse reactions from the bar or judges of the 9 circuits (and 21 states) that now allow citation to unpublished opinions. And from that quarter no protest has been heard. This implies to me that the benefits of accountability and uniform national practice carry the day." [03-AP-367]

7. Regarding the argument that Rule 32.1 would dramatically increase the workload of judges:

a. First, there is no evidence that this has occurred in jurisdictions that have abandoned or liberalized citation rules. One reason why liberalizing citation rules does not seem to result in more work for judges is that unpublished opinions have never been written just for parties and counsel, as proponents of no-citation rules insist. Those decisions have also been written for the en banc court and the Supreme Court. "This may be why the nine circuits that allow citation to these documents have not experienced difficulty: the prospect of citation to a different panel requires no more of the order's author than does the prospect of criticism in a petition for a writ of certiorari." [03-AP-367]

b. Second, judges already have available to them options that would reduce their workloads far more than no-citation rules.

i. Judges now spend too much time on drafting published opinions.

— The overwork that judges cite in arguing against Rule 32.1 is in part a function of increasing caseloads — which are largely outside of judges' control — but also a function of a particular style of judging. Some of the arguments against Rule 32.1 reflect an attitude toward judging that has become too common in the federal appellate courts and that should be changed.

— A judge who claims that he or she sometimes needs to go through 70 or 80 drafts of an opinion before getting every word exactly right has confused the function of a judge with the function of a legislator. Judges are appointed not to draft statutes, but to resolve concrete

disputes. What they hold is law; everything else is dicta. Lower court judges understand this; they know how to read a decision and extract its holding.

— Judges could save a lot of time if they would abandon "the discursive, endless federal appellate opinion." [03-AP-435] Judges should write short, direct opinions that address only the one or two issues that most need substantial discussion. Instead, judges too often trudge through every issue mentioned anywhere in a brief. Judges should also spend less time obsessing over every footnote and comma.

ii. Judges also now spend too much time on drafting unpublished opinions.

— If unpublished opinions were written as judges claim — if they were two- or three-paragraph opinions that started with "the parties are familiar with the facts" and then very briefly described why the court agreed or disagreed with the major contentions — then parties would not *want* to cite them. But many unpublished decisions go far beyond this. They are 10 or 12 pages long, they contain a great deal of discussion of the facts, and they go on and on about the law. If an opinion looks like a duck and quacks like a duck, parties are going to want to cite it like a duck.

— It is odd to fix the problems with unpublished opinions not by fixing the problems with unpublished opinions but by barring people from talking about unpublished opinions. Judges would not need no-citation rules if they would confine themselves to issuing (1) full precedential opinions in cases that warrant such treatment or (2) two- or three-paragraph explanations in cases that do not. The problem is that judges insist on "a third, intermediate option: a full and reasoned but unprecedent[ial] appellate opinion." [03-AP-219] Judges have only themselves to blame.

c. Third, if abolishing no-citation rules had the impact on judges' workload that Rule 32.1's opponents fear, then no-citation

rules would not be on the wrong side of history. But they are. "The citadel of no-citation rules is falling. There is a clear trend, both in the individual federal circuits and in the states, toward abandoning those rules. Nine of the thirteen circuits now allow citation of unpublished opinions. And while a majority of the states still prohibit such citation, the margin is slim and dwindling." [03-AP-032] As courts have uniformly gotten more busy, the trend has uniformly been toward liberalizing rules regarding the citation of unpublished opinions. Obviously even busy courts have been able to handle their caseloads despite abolishing no-citation rules.

d. Rule 32.1 would, in some respects, *reduce* the workload of judges, because no-citation rules require judges and litigants to treat as issues of first impression questions that have already been addressed many times by the circuit.

i. Take, for example, *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062-63 (9th Cir. 2000), in which the Ninth Circuit admitted that various panels had issued at least 20 unpublished opinions resolving the same unsettled issue of law at least three different ways — all before any published opinion addressed the issue. To quote *Rivera-Sanchez*,

> "Our conclusion that this decision meets the criteria for publication was prompted by the fact that it establishes a rule of law that we had not previously announced in a published opinion. Various three-judge panels of our court, however, have issued a number of unpublished memorandum decisions taking different approaches to resolving the question whether the Supreme Court's opinion in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), requires a district court faced with a defendant convicted of illegal re-entry after deportation whose indictment refers to both 8 U.S.C. § 1326(a) and 8 U.S.C. § 1326(b)(2) to resentence or merely correct the judgment of conviction. These conflicting mandates undoubtedly have created no small amount of confusion for district judges who serve in border districts. While our present circuit rules prohibit the citation of unpublished memorandum dispositions, see 9th Cir. R. 36-3, we are mindful of the fact that they are readily available in on line legal databases such as Westlaw and Lexis.

> "During oral argument, we asked counsel to submit a list of the unpublished dispositions of this court that have confronted this issue. The parties produced a list of twenty separate unpublished dispositions instructing district courts to take a total of three different approaches to correct the problem. Under our rules, these unpublished memorandum dispositions have no precedential value, see 9th Cir. R. 36-3, and this opinion now reflects the law of the circuit. To avoid even the possibility that someone might rely upon them, however, we list these unpublished memorandum decisions below so that counsel and the district courts will know that each of them has been superseded today."

ii. It is hard to know how the Ninth Circuit's no-citation rule saved the court any time in this instance. An issue that could have been settled authoritatively on the first or second occasion instead was litigated at least 21 times. Had an attorney representing a party in, say, the sixth case been able to draw the court's attention to its five prior decisions, it seems likely that the court would have issued a published opinion settling the issue. And attorneys likely would not have litigated the issue over and over again if the court's rules had not required them to treat an issue that had already been addressed 20 times as an issue of first impression. No-citation rules keep issues "in play" — and thus encourage litigation — much longer than necessary.

8. Regarding the argument that Rule 32.1 would result in more one-line dispositions:

a. Opponents of Rule 32.1 have argued both (i) that one-line dispositions would be harmful because parties would not get an explanation of why they won or lost *and* (ii) that the explanation that many unpublished opinions give parties about why they won or lost is not accurate. What judges are arguing is that they need to be able to keep up the *illusion* of giving parties adequate explanations for the results of cases. This is not a compelling reason to maintain no-citation rules.

b. It would be better for courts to issue no opinion at all than an opinion that so poorly reflects the views of the judges that those judges are unwilling to have it cited back to them. If, as many judges claim, unpublished opinions accurately report only a result — and not necessarily the reason for the result — then the court should just issue

a result. As one commentator wrote: "If the result of adopting the proposed rule is to force judicial *staff* to write less in unpublished orders, then so be it. It is better to have a one-sentence disposition written by an actual judge th[a]n three pages written by a recent law school graduate masquerading as a judge. There is no point . . . for offering an explanation of the court's reasoning to litigants when the court itself is unwilling to be bound by that reasoning." [03-AP-414]

9. Regarding the argument that Rule 32.1 would result in unpublished opinions being used to mislead courts — or that courts would misuse or misunderstand unpublished opinions:

a. The circuit judges who write unpublished opinions do not need this protection. Whatever the flaws of unpublished opinions, those flaws are best known to the judges who write them. It is unlikely that a court will give its own opinion "too much" weight or not understand the limitations of an opinion that it wrote.

b. Lower court judges also do not need this protection.

i. Some of the comments against Rule 32.1 take a dim view of the abilities of district court judges. Commentators suggest, for example, that no-citation rules are needed to keep district court judges from being "distracted" by citations to unpublished opinions and to prevent judges from giving those opinions too much weight.

ii. This concern is misplaced. District court judges are entrusted on a daily basis with the lives and fortunes of those who appear before them. They regularly grapple with the most complicated legal and factual issues imaginable. They are quite capable of understanding and respecting the limitations of unpublished opinions.

iii. District courts have nonbinding authorities cited to them every day. For example, a district court in Oregon may have a decision of the Ninth Circuit, a decision of the Second Circuit, a decision of the Illinois Supreme Court, and a law review article cited to it in the course of one brief. It is not terribly difficult for the district court to understand the difference between the Ninth Circuit cite and the other cites. Likewise, it will not be terribly difficult for the district court to understand the difference between a published opinion of the Ninth Circuit that it is obligated to follow and an unpublished decision that it is not.

iv. District judges have the courage to disagree with unpublished decisions that they believe are wrong. Moreover, given that numerous circuit judges have commented publicly about the poor quality of unpublished decisions, it may not even take much courage to disagree with those decisions. In several circuits, unpublished decisions can be cited to district courts, and there is no evidence that district courts have felt compelled to treat those decisions as binding for fear of provoking the appellate courts.

10. Regarding the argument that Rule 32.1 would result in attorneys having to do much more legal research and clients having to pay much higher legal bills:

a. To begin with, if no-citation rules really spared attorneys and their clients from the fate predicted by opponents of Rule 32.1, then those rules would be widely supported by the bar. They are not, at least outside of the Ninth Circuit:

i. The ABA House of Delegates declared in 2001 that no-citation rules are "contrary to the best interests of the public and the legal profession" and called upon the federal appellate courts to "permit citation to relevant unpublished opinions."

ii. The former chair of the D.C. Circuit's Advisory Committee on Procedures wrote: "Probably more than any other facet of appellate practice, these [no-citation] policies have drawn well-deserved criticism from the bar and from scholars. When I chaired the D.C. Circuit's Advisory Committee on Procedures, this kind of practice was perennially and uniformly condemned — all to no avail." [03-AP-016]

iii. Rule 32.1 is supported by such national organizations as the ABA and the American College of Trial Lawyers, by bar organizations in New York and Michigan, and by such public interest organizations as Public Citizen Litigation Group and Trial Lawyers for Public Justice.

iv. By contrast, only lawyers who clerked for or who appear before Ninth Circuit judges have complained in great number about Rule 32.1. If Rule 32.1 were likely to create the predicted problems, lawyers from throughout the United States should be rising up against it, led by such organizations as the ABA.

b. In any event, Rule 32.1 would not create serious problems for attorneys and their clients:

i. Opponents of Rule 32.1 are simply wrong in arguing that they now have no duty to research unpublished opinions, but, if those opinions could be cited, they would then have a duty to research all unpublished opinions.

ii. It is not the ability to *cite* unpublished opinions that triggers a duty to research them.

— If unpublished opinions contain something of value, then attorneys already have an obligation to research them — so as to be able to advise clients about the legality of their conduct, predict the outcome of litigation, and get ideas about how to frame and argue issues before the court.

— If unpublished opinions do not contain something of value, then attorneys will not have an obligation to research them even if they can be cited. No rule of professional responsibility requires attorneys to research useless materials.

iii. In researching unpublished opinions, attorneys already apply the same common sense that they apply in researching everything else. No attorney conducts research by reading every case, treatise, law review article, and other writing in existence on a particular point — and no attorney will conduct research that way if unpublished opinions can be cited. If a point is well-covered by published opinions, an attorney will not read unpublished opinions at all. But if a point is not addressed in any published opinion, an attorney will look at unpublished opinions, as he or she should.

11. Several of those who commented in favor of Rule 32.1 made clear that they were doing so only because they view it as a valuable "first step." These commentators argued that the practice of issuing unpublished decisions should be abolished and criticized the Committee for "legitimizing" or "tacitly endorsing" the practice in Rule 32.1. At the same time, at least one judge said that he did not object to Rule 32.1, but that he wanted to put the Committee on notice that he would strongly oppose any future rule requiring that unpublished opinions be treated as precedential.

b. Summary of Arguments Regarding Form

Not surprisingly, the comments that we received about Rule 32.1 focused on the substance, not on the drafting. Most of the remarks about the drafting were off-hand, such as the occasional comment that Rule 32.1 was "clear" or "well drafted." The commentators did not seem to have any trouble understanding the rule.

The only confusion about the meaning of the rule that appeared with any frequency in the comments was the assumption that the rule would require courts to treat unpublished opinions as binding precedent. (I am not referring to the commentators who explained why they thought Rule 32.1 would do so *de facto*; I am referring only to those who seemed to assume that it would do so *de jure*.) It is difficult to know how much confusion exists on this point, as the commentators used the word "precedent" loosely. Some used it to mean binding precedent; others used it to mean merely non-binding guidance; and still others were not clear about how they were using it. In any event, I do not believe that this confusion can be traced to the drafting of either the rule or the Committee Note. Rather, I suspect that, to the extent that there was confusion on the point, it was confined to commentators who had heard about the rule but had not read it themselves.

Several commentators — in reference to the sentence in the Committee Note about the "conflicting" local rules of the courts of appeals — pointed out that the rules do not "conflict," in the sense of demanding inconsistent conduct from any person, because each circuit's rule applies only to that circuit's unpublished opinions.

Only **three commentators** — all supporters of Rule 32.1 — suggested that it be rewritten in some respect:

Philip Allen Lacovara, Esq. (03-AP-016) supports Rule 32.1, but recommends a couple of changes:

1. Mr. Lacovara objects that, by referring to dispositions that have been "designated as . . . 'non-precedential," Rule 32.1(a) "necessarily implies that such designations have legal force and effect" — something Mr. Lacovara disputes. So as to avoid "legitimizing" the attempts by judges to label some of their opinions "non-precedential," Rule 32.1(a) should end with the word

"dispositions": "No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions."

2. Mr. Lacovara argues that, even if that suggestion is rejected, the Committee should eliminate the "generally imposed" clause in Rule 32.1(a). He thinks it is "ludicrous" for the Committee to approve a proposed rule "that appears to license the circuits by local rule to ban *all* citations to all prior decisions." He also dismisses the concern, mentioned in the Committee Note, that a circuit might promulgate a local rule requiring that copies of all unpublished opinions cited in a brief be served and filed. He believes that such a local rule is already foreclosed by Rule 32.1(b).

Prof. Stephen R. Barnett of the University of California at Berkeley School of Law (Boalt Hall) (03-AP-032) strongly supports the substance of Rule 32.1(a), but, in a recent law review article, was very critical of its drafting — and, in particular, of the decision to forego what he calls a "permissive" approach (that is, to state affirmatively that unpublished opinions may be cited) in favor of a "prohibitory" approach (that is, to bar restrictions on the citation of unpublished opinions):

1. Despite acknowledging that the text of the rule addresses only the "citation" of unpublished opinions, and despite acknowledging that the Committee Note "is at pains to make clear that [the] proposed Rule 'says nothing whatsoever about the effect that a court must give' to an unpublished opinion," Prof. Barnett still believes that it is "not clear" whether Rule 32.1(a) would force courts to treat unpublished opinions as binding precedent. He argues that a local rule deeming unpublished opinions to be "non-precedential" could be seen as a "restriction" placed upon the "citation" of those opinions — and, because this "restriction" would be placed only upon unpublished opinions, it would be barred by Rule 32.1(a) as drafted. Prof. Barnett argues this problem — and others -- could be avoided if Rule 32.1(a) would simply state affirmatively: "Any opinion, order, judgment, or other disposition by a federal court may be cited to or by any court."

2. Prof. Barnett acknowledges that his alternative would not prevent courts from placing restrictions upon the citation of unpublished opinions, such as branding them as "disfavored" or providing that they can be cited only when no published opinion will

serve as well. But Prof. Barnett makes three points about these restrictions (which he refers to as "discouraging words"):

a. First, Prof. Barnett argues that it is not clear whether a local rule that disfavors the citation of unpublished opinions or that restricts the citation of unpublished opinions to situations in which adequate published opinions are lacking imposes a "restriction" upon the citation of unpublished opinions — and thus it is unclear whether Rule 32.1(a) as drafted is effective in barring such local rules. He argues that to instruct counsel that citation of unpublished opinions is "disfavored" is not necessarily to "restrict" their citation. He also points out that some restrictions on citation are worded in terms of counsel's "belief" about the adequacy of published opinions on an issue — and that such rules are more "admonitory" than "enforceable." He concedes, though, that some local rules do appear to impose a "restriction" on citation, and thus would be barred by Rule 32.1(a) as drafted — but not by his alternative.

b. Second, Prof. Barnett downplays the possibility that a circuit dominated by "adamant anti-citationists . . . might impose some 'prohibition or restriction' that would make it difficult or impossible for attorneys to cite unpublished opinions." In Prof. Barnett's view, "[f]ederal circuit judges can be expected to obey the Federal Rules of Appellate Procedure, and to do so in spirit as well as in letter."

c. Finally, Prof. Barnett argues that, in any event, circuits *should* be able to discourage the citation of unpublished opinions and *should* be able to impose restrictions upon them -- such as the restriction that they can be cited only when adequate published opinions are absent. Prof. Barnett repeats the familiar arguments about the lesser quality of unpublished opinions and argues that there is nothing wrong with treating them as "second-class precedents" — "as long as the[ir] citation is *allowed*."

Judge Frank H. Easterbrook of the Seventh Circuit (03-AP-367) supports the rule, but generally agrees with Prof. Barnett's comments about drafting. He also singles out for criticism the

following sentence in the Committee Note: "At the same time, Rule 32.1(a) does not prevent courts from imposing restrictions as to form upon the citation of all judicial opinions (such as a rule requiring that case names appear in italics or a rule requiring parties to follow The Bluebook in citing judicial opinions.") Judge Easterbrook points out that Rule 32(e) *does* bar circuits from imposing typeface or other requirements, and thus the Committee Note to Rule 32.1 should not imply that circuits retain this authority.

The **Style Subcommittee** (04-AP-A) makes the following suggestions:

1. Change the heading from "Citation of Judicial Dispositions" to "Citing Judicial Dispositions."

2. In subdivision (a), change "upon the citation of" to "on citing" both places where the phrase occurs.

3. In subdivision (b), change "A party who cites" to "If a party cites," insert a comma after "database," insert "the party" before "must file," and delete "other written."

c. List of Commentators

i. Commentators Who Oppose Proposed Rule

Federal Circuit Court Judges

First Circuit

Chief Judge Michael Boudin (03-AP-192) (did not expressly oppose Rule 32.1, but said that almost all of the First Circuit's judges believe that restricting citation to situations in which no published opinion adequately addresses the issue is "a reasonable local limitation")

Second Circuit

Chief Judge John M. Walker, Jr. (03-AP-329) (on behalf of himself and 18 active and senior judges on the Second Circuit) (Chief Judge Walker testified at 4/13 hearing)

Third Circuit

Senior Judge Ruggero J. Aldisert (03-AP-293)

Fourth Circuit

Judge M. Blane Michael (03-AP-401)

Fifth Circuit

Senior Judge Thomas M. Reavley (03-AP-170)

Sixth Circuit

Judge Boyce F. Martin, Jr. (03-AP-269)

Seventh Circuit

Judges John L. Coffey, Richard D. Cudahy, Terence Evans, Michael S. Kanne, Daniel A. Manion, Richard A. Posner, Ilana Diamond Rovner, Diane P. Wood, and Ann Claire Williams (03-AP-396) (joint letter) (Judge Wood testified at 4/13 hearing)

Eighth Circuit

Senior Judge Myron H. Bright (03-AP-047) (Judge Bright testified at 4/13 hearing)

Chief Judge James B. Loken (03-AP-499) (reporting that 7 of 9 active judges and 3 of 4 senior judges expressing a view on Rule 32.1 opposed it)

Ninth Circuit

Senior Judge Arthur L. Alarcón (03-AP-290)

Judge Carlos Tiburcio Bea (03-AP-130)

Senior Judge Robert R. Beezer (03-AP-292)

Judge Marsha S. Berzon (03-AP-134)

Senior Judge Robert Boochever (03-AP-046)

Senior Judge James R. Browning (03-AP-076)

Judge Jay S. Bybee (03-AP-327)

Judge Consuelo M. Callahan (03-AP-318)

Senior Judge William C. Canby, Jr. (03-AP-110)

Senior Judge Jerome Farris (03-AP-156)

Senior Judge Warren J. Ferguson (03-AP-167)

Senior Judge Ferdinand F. Fernandez (03-AP-061)

Judge Raymond C. Fisher (03-AP-366)

Judge William A. Fletcher (03-AP-059)

Senior Judge Alfred T. Goodwin (03-AP-026)

Judge Susan P. Graber (03-AP-400)

Senior Judge Cynthia Holcomb Hall (03-AP-133)

Judge Michael Daly Hawkins (03-AP-291)

Senior Judge Procter Hug, Jr. (03-AP-063)

Judge Alex Kozinski (03-AP-169)

Senior Judge Edward Leavy (03-AP-289)

Judge M. Margaret McKeown (03-AP-350)

Senior Judge Dorothy W. Nelson (03-AP-131)

Senior Judge Thomas G. Nelson (03-AP-067)

Senior Judge John T. Noonan, Jr. (03-AP-052)

Judge Diarmuid F. O'Scannlain (03-AP-285)

Judge Richard A. Paez (03-AP-273)

Judge Stephen Reinhardt (03-AP-402)

Judge Pamela Ann Rymer (03-AP-233)

Judge Barry G. Silverman (03-AP-075)

Senior Judge Otto R. Skopil, Jr. (03-AP-135)

Senior Judge Joseph T. Sneed (03-AP-077)

Judge Richard C Tallman (03-AP-081)

Judge Sidney R. Thomas (03-AP-398)

Senior Judge David R. Thompson (03-AP-403)

Judge Stephen S. Trott (03-AP-129)

Senior Judge J. Clifford Wallace (03-AP-082)

Judge Kim McLane Wardlaw (03-AP-132)

Tenth Circuit

None

Eleventh Circuit

Judge Stanley F. Birch, Jr. (03-AP-496)

Federal Circuit

Judge Timothy B. Dyk (03-AP-397)

Senior Judge Daniel M. Friedman (03-AP-506)

Chief Judge Haldane Robert Mayer (03-AP-086) (on behalf of all Federal Circuit judges) (Chief Judge Mayer and Judge William Curtis Bryson testified at 4/13 hearing)

Judge Paul R. Michel (03-AP-505)

Senior Judge S. Jay Plager (03-AP-297)

Federal District Court Judges

Northern District of California

Senior Judge William W. Schwarzer (03-AP-065)

District of Hawaii

Chief Judge David Alan Ezra (03-AP-250)

Northern District of Illinois

Judge Robert W. Gettleman (03-AP-054)

Senior Judge Milton I. Shadur (03-AP-066)

Federal Magistrate Judges

District of Arizona

Magistrate Judge Virginia A. Mathis (03-AP-136)

Central District of California

Magistrate Judge Jeffrey W. Johnson (03-AP-399)

Magistrate Judge Joseph Reichmann (Retired) (03-AP-484)

Federal Bankruptcy Judges

Central District of California

Judge Alan M. Ahart (03-AP-351)

Judge Ellen Carroll (03-AP-278)

Judge Geraldine Mund (03-AP-074)

Chief Judge Barry Russell (03-AP-405)

Judge John E. Ryan (03-AP-252)

Judge Maureen A. Tighe (03-AP-294)

Judge Vincent P. Zurzolo (03-AP-174)

Southern District of California

Chief Judge John J. Hargrove (03-AP-281) (on behalf of himself and 3 other judges on his court)

Eastern District of Washington

Judge Patricia C. Williams (03-AP-056)

Other Federal Judges

U.S. Court of International Trade

Chief Judge Jane A. Restani (03-AP-137)

U.S. Tax Court

Judge Mark V. Holmes (03-AP-359)

State Appellate Judges

California

Justice William W. Bedsworth, California Court of Appeal, Fourth Appellate District (03-AP-280) (on behalf of himself and 5 colleagues)

Justice Paul Boland, California Court of Appeal, Second Appellate District (03-AP-295)

Chief Justice Ronald M. George, Supreme Court of California (03-AP-471)

Presiding Justice Laurence D. Kay, California Court of Appeal, First Appellate District (03-AP-404)

Justice Richard C. Neal (retired), California Court of Appeal, Second Appellate District (03-AP-126)

Presiding Justice Robert K. Puglia (retired), California Court of Appeal, Third Appellate District (03-AP-155)

Justice Maria P. Rivera, California Court of Appeal, First Appellate District (03-AP-048)

Justice W.F. Rylaarsdam, California Court of Appeal, Fourth Appellate District (03-AP-193)

Presiding Justice Arthur G. Scotland, California Court of Appeal, Third Appellate District (03-AP-372)

Justice Gary E. Strankman (retired), California Court of Appeal, First Appellate District (03-AP-296)

Wisconsin

Judge Ralph Adam Fine, Wisconsin Court of Appeals (03-AP-068)

State Trial Judges

California

Judge N.A. "Tito" Gonzales, Superior Court, Santa Clara County (03-AP-038)

Law Professors

Dean Scott A. Altman, University of Southern California Law School (03-AP-314)

Prof. Jerry L. Anderson, Drake University Law School (03-AP-078)

Prof. Stuart Banner, UCLA School of Law (03-AP-072)

Prof. Brian Bix, University of Minnesota Law School (03-AP-021)

Prof. Charles E. Cohen, Capital University Law School (03-AP-298)

Prof. Ross E. Davies, George Mason University School of Law (03-AP-392)

Prof. Michele Landis Dauber, Stanford Law School (03-AP-029)

Prof. Ward Farnsworth, Boston University School of Law (03-AP-221) (neither supports nor opposes rule, but raises concerns)

Prof. Victor Fleischer, UCLA School of Law (03-AP-062)

Prof. Thomas Healy, Seton Hall University Law School (03-AP-380)

Prof. Michael S. Knoll, University of Pennsylvania Law School (03-AP-093)

Prof. Mark Lemley, Boalt Hall School of Law (03-AP-153)

Prof. Rory K. Little, Hastings College of the Law (03-AP-334)

Prof. Gregory N. Mandel, Albany Law School (03-AP-274)

Prof. Fred S. McChesney, Northwestern University School of Law (03-AP-507)

Prof. Brett H. McDonnell, University of Minnesota Law School (03-AP-467)

Prof. Richard W. Painter, University of Illinois College of Law (03-AP-091)

Prof. Ethan Stone, University of Iowa College of Law (03-AP-198)

Prof. George M. Strickler, Tulane Law School (03-AP-100)

Prof. Daniel P. Tokaji, Moritz College of Law, Ohio State University (03-AP-045)

Prof. Eugene Volokh, UCLA School of Law (03-AP-158)

Prof. Nhan Vu, Chapman University School of Law (03-AP-477)

Department of Justice (writing in personal capacities)

William A. Burck, Esq., U.S. Attorney's Office, New York, NY (03-AP-164)

E. Vaughn Dunnigan, Esq., U.S. Attorney's Office, Atlanta, GA (03-AP-322)

Robert K. Hur, Esq., Department of Justice, Washington, DC (03-AP-330)

Federal Defender's Offices

Federal Public Defender for the District of Alaska

Rich Curtner, Esq. (03-AP-459)

Federal Public Defender for the Central District of California

Jeffrey A. Aaron, Esq. (03-AP-485)

Manuel U. Araujo, Esq. (03-AP-305)

Lara A. Bazelon, Esq. (03-AP-160)

Davina T. Chen, Esq. (03-AP-162)

Michael Garcia, Esq. (03-AP-256)

Carlton F. Gunn, Esq. (03-AP-172)

Evan A. Jenness, Esq. (03-AP-179)

Mary E. Kelly, Esq. (03-AP-168)

Monica Knox, Esq. (03-AP-165)

James H. Locklin, Esq. (03-AP-139)

Oswald Parada, Esq. (03-AP-248)

Maria E. Stratton, Esq. (03-AP-413)

Myra Sun, Esq. (03-AP-195)

Hoyt Y. Sze, Esq. (03-AP-251)

Michael Tanaka, Esq. (03-AP-199)

Craig Wilke, Esq. (03-AP-194)

Federal Public Defender for the Eastern District of California

Rachelle D. Barbour, Esq. (03-AP-102)

Allison Claire, Esq. (03-AP-159)

Quin Denvir, Esq. (03-AP-312)

Mary M. French, Esq. (03-AP-237)

David M. Porter, Esq. (03-AP-355)

Katina Whalen, Legal Secretary (03-AP-461)

Federal Public Defender for the Northern District of California

Barry J. Portman, Esq. (03-AP-436)

Federal Defenders of San Diego, Inc.

Shereen J. Charlick, Esq. (03-AP-279)

Judy Clarke, Esq. (03-AP-246)

Mario G. Conte, Esq. (03-AP-287)

Kurt D. Hermansen, Esq. (03-AP-173, 03-AP-182)

Steven F. Hubachek, Esq. (03-AP-474)

Andrew K. Nietor, Esq. (03-AP-138)

Kara B. Persson, Esq. (03-AP-177)

David M. Porter, Esq. (03-AP-355)

Diane M. Regan, Esq. (03-AP-181)

Chase A. Scolnick, Esq. (03-AP-184)

Timothy A. Scott, Esq. (03-AP-190)

Michelle Villasenor-Grant, Esq. (03-AP-115)

Matthew C. Winter, Esq. (03-AP-114)

Federal Public Defender for the District of Hawaii

James S. Gifford, Esq. (03-AP-385)

Alexander Silvert, Esq. (03-AP-378)

Peter C. Wolff, Jr., Esq. (03-AP-377)

Federal Public Defender for the Northern District of Illinois

Carol A. Brook, Esq. (03-AP-438) (on behalf of all staff and panel attorneys)

Federal Public Defender for the Northern and Southern Districts of Iowa

Nicholas Drees, Esq. (03-AP-418)

Federal Public Defender for the District of Nevada

Ellen Callahan, Esq. (03-AP-383)

Jason F. Carr, Esq. (03-AP-340)

Franny A. Forsman, Esq. (03-AP-303)

Cynthia S. Hahn, Esq. (03-AP-320)

Michael J. Kennedy, Esq. (03-AP-357)

Randall S. Lockhart, Esq. (03-AP-342)

Michael Pescetta, Esq. (03-AP-390)

Michael K. Powell, Esq. (03-AP-354)

Jennifer Schlotterbeck, Esq. (03-AP-338)

Anne R. Traum, Esq. (03-AP-453)

Federal Defender Division, Legal Aid Society, Southern District of New York

Leonard F. Joy, Esq., and Barry D. Leiwant, Esq. (03-AP-428)

Federal Public Defender for the Districts of Northern New York & Vermont

Alexander Bunin, Esq. (03-AP-333)

Federal Public Defender for the Eastern District of North Carolina

G. Alan DuBois, Esq. (03-AP-375) (on behalf of entire office)

Federal Public Defender for the District of Oregon

Lisa Hay, Esq. (03-AP-344)

Steven T. Wax, Esq. (03-AP-371)

Mark B. Weintraub, Esq. (03-AP-119)

Federal Public Defender for the Eastern District of Virginia

Frank W. Dunham, Jr., Esq. (03-AP-439) (on behalf of entire office)

Federal Defenders of Eastern Washington and Idaho

Ben Hernandez, Esq. (03-AP-443)

Stephen R. Hormel, Esq. (03-AP-388)

Bruce Livingston, Esq. (03-AP-240)

Rebecca L. Pennell, Esq. (03-AP-446)

Roger James Peven, Esq. (03-AP-386)

Samuel Richard Rubin, Esq. (03-AP-124)

Nicolas V. Vieth, Esq. (03-AP-445)

Anne Walstrom, Esq. (03-AP-442)

Federal Public Defender for the Western District of Washington

Thomas W. Hillier II, Esq. (03-AP-384)

Attorneys in Private or Government Practice

D.C. Circuit

Stewart A. Baker, Esq., Steptoe & Johnson LLP, Washington, DC (03-AP-111)

Thomas M. Barba, Esq., Steptoe & Johnson LLP, Washington, DC (03-AP-370)

Lee A. Casey, Esq., Baker & Hostetler LLP, Washington, DC (03-AP-478)

Lauren A. Degnan, Esq., Howard G. Pollack, Esq., and Frank E. Scherkenbach, Esq., Fish & Richardson P.C., Washington, DC (03-AP-339)

Steven A. Engel, Esq., Kirkland & Ellis LLP, Washington, DC (03-AP-458)

Brian T. Fitzpatrick, Esq., Sidley Austin Brown & Wood LLP, Washington, DC (03-AP-104)

Daniel L. Geyser, Robbins, Russell, et al., Washington, DC (03-AP-490)

Kathryn R. Haun, Esq., Sidley Austin Brown & Wood LLP, Washington, DC (03-AP-422)

Susan E. Kearns, Esq., Kirkland & Ellis LLP, Washington, DC (03-AP-460)

Jennifer M. Mason, Esq., Holland & Knight LLP, Washington, DC (03-AP-361)

Marc S. Mayerson, Esq., Spriggs & Hollingsworth, Washington, DC (03-AP-028)

Brian J. Murray, Esq., Jones Day, Washington, DC (03-AP-096)

Daniel M. Nelson, Esq., Kirkland & Ellis, Washington, DC (03-AP-307)

Eugene M. Paige, Esq., Washington, DC (03-AP-301)

David B. Rivkin, Jr., Esq., Baker & Hostetler LLP, Washington, DC (03-AP-479)

Sylvia Royce, Esq., Washington, DC (03-AP-116)

Derek L. Shaffer, Esq., Cooper & Kirk, Washington, DC (03-AP-080)

Kenneth W. Starr, Esq., Kirkland & Ellis LLP, Washington, DC (03-AP-469)

Arlus J. Stephens, Esq., Washington, DC (03-AP-229)

Robert E. Toone, Esq., Washington, DC (03-AP-092)

David B. Walker, Esq., Washington, DC (03-AP-441) (on behalf of himself and 21 other former Federal Circuit law clerks)

Christian A. Weideman, Esq., Williams & Connolly LLP, Washington, DC (03-AP-302)

First Circuit

Antonio D. Martini, Esq., Boston, MA (03-AP-486)

Damon A. Katz, Esq., Boston, MA (03-AP-231)

Pedro Sandoval, Jr., Esq., Boston, MA (03-AP-498)

Anthony J. Vlatas, Esq., York, ME (03-AP-310)

Second Circuit

Brian J. Alexander, Esq., Kreindler & Kreindler LLP, New York, NY (03-AP-379) (on behalf of entire firm)

Ramsey Clark, Esq., New York, NY (03-AP-431)

David S. Gould, Esq., Port Washington, NY (03-AP-053)

Diane Knox, Esq., New York, NY (03-AP-492)

Daniel B. Levin, Esq., Debevoise & Plimpton LLP, New York, NY (03-AP-105)

Joanne Mariner, Esq., New York, NY (03-AP-427)

Julian J. Moore, Esq., New York, NY (03-AP-282)

Richard H. Rosenberg, Esq., New York, NY (03-AP-117)

James E. Stern, Esq., Syracuse, NY (03-AP-260)

Theresa Trzaskoma, Esq., Brooklyn, NY (03-AP-043)

Amir Weinberg, Esq., Paul, Weiss, et al., New York, NY (03-AP-022)

Rowan D. Wilson, Esq., Cravath, Swaine & Moore LLP, New York, NY (03-AP-466)

Harvey Winer, Esq., Salzman & Winer, LLP, New York, NY (03-AP-332)

Third Circuit

Craig L. Hymowitz, Esq., Blank Rome LLP, Philadelphia, PA (03-AP-421)

Fourth Circuit

Gail S. Coleman, Esq., Bethesda, MD (03-AP-024)

Josh Goldfoot, Esq., Arlington, VA (03-AP-121)

Jeffrey A. Lamken, Esq., Arlington, VA (03-AP-433)

Carlton F.W. Larson, Esq., Arlington, VA (03-AP-360)

Benjamin I. Sachs, Esq., Olney, MD (03-AP-030)

Bruce Wieder, Esq., Burns, Doane, Swecker & Mathis, LLP, Alexandria, VA (03-AP-430)

Fifth Circuit

Robert N. Markle, Esq., New Orleans, LA (03-AP-015)

Harry Susman, Esq., Susman Godfrey LLP, Houston, TX (03-AP-412)

Sixth Circuit

Richard Crane, Esq., Nashville, TN (03-AP-125)

Joseph R. Dreitler, Esq., Jones Day , Columbus, OH (03-AP-309)

Charles M. Miller, Esq., Law Clerk, Supreme Court of Ohio, Columbus, OH (03-AP-228)

Seventh Circuit

Fred H. Bartlit, Jr., Esq., Bartlit Beck et al., Chicago, IL (03-AP-266)

Sean W. Gallagher, Esq., Bartlit Beck et al., Chicago, IL (03-AP-245)

Robert K. Niewijk, Esq., Oak Park, IL (03-AP-095)

Mark Ouweleen, Esq., Bartlit Beck et al., Chicago, IL (03-AP-258)

David B.H. Williams, Esq., Williams, Bax & Ellis, P.C., Chicago, IL (03-AP-313)

Eighth Circuit

Veronica L. Duffy, Esq., Duffy & Duffy, Rapid City, SD (03-AP-001)

Jonathan C. Wilson, Esq., Davis, Brown, et al., Des Moines, IA (03-AP-306)

Ninth Circuit

Mark F. Adams, Esq., San Diego, CA (03-AP-509)

Daniel J. Albregts, Esq., Las Vegas, NV (03-AP-358)

Bernard J. Allard, Esq., Popelka Allard, A.P.C., San Jose, CA (03-AP-050)

Marilyn Weiss Alper, Esq., Senior Judicial Research Attorney, California Court of Appeal, Second Appellate District, Los Angeles, CA (03-AP-304)

Fred H. Altshuler, Esq., Altshuler, Berzon, et al., San Francisco, CA (03-AP-244)

Honey Kessler Amado, Esq., Beverly Hills, CA (03-AP-457)

Robert G. Badal, Esq., Los Angeles, CA (03-AP-462) (on behalf of himself and 4 colleagues)

Donna Bader, Esq., Laguna Beach, CA (03-AP-185)

Scott Bales, Esq., Lewis and Roca LLP, Phoenix, AZ (03-AP-416)

Sondra K. Barbour, Esq., McKenna Long & Aldridge LLP, Los Angeles, CA (03-AP-389)

Michael Barclay, Esq., Palo Alto, CA (03-AP-142)

Michael Bergfeld, Esq., Burbank, CA (03-AP-215)

Stephen P. Berzon, Esq., Altshuler, Berzon, et al., San Francisco, CA (03-AP-267)

Douglas W. Bordewieck, Esq., and Arthur Fine, Esq., Mitchell Silberberg & Knupp LLP, Los Angeles, CA (03-AP-060)

Richard H. Borow, Esq., Irell & Manella LLP, Los Angeles, CA (03-AP-112)

Gary L. Bostwick, Esq., Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA (03-AP-356)

Kevin R. Boyle, Esq., Greene, Broillet, Panish & Wheeler LLP, Santa Monica, CA (03-AP-501)

Jerald L. Brainin, Esq., Los Angeles, CA (03-AP-191)

Michael A. Brodsky, Esq., Law Offices of Michael A. Brodsky, San Francisco, CA (03-AP-200)

Karyn H. Bucur, Esq., Laguna Hills, CA (03-AP-171)

Lawrence A. Callaghan, Esq., Tucker Ellis & West LLP, San Francisco, CA (03-AP-321)

John P. Cardosi, Esq., Popelka Allard, A.P.C., San Jose, CA (03-AP-040)

William C. Carrico, Esq., Las Vegas, NV (03-AP-450)

Vince G. Chhabria, Esq., Covington & Burling, San Francisco, CA (03-AP-253)

Danny Chou, Esq., Staff Attorney, California Supreme Court, Sacramento, CA (03-AP-254)

John J. Cleary, Esq., Cleary & Sevilla, LLP, San Diego, CA (03-AP-242)

Marc S. Cohen, Esq., Kaye Scholer LLP, Los Angeles, CA (03-AP-349) (on behalf of himself and 1 colleague)

Bennett Evan Cooper, Esq., Steptoe & Johnson LLP, Phoenix, AZ (03-AP-432)

Joseph W. Cotchett, Esq., Cotchett, Pitre, Simon & McCarthy, Burlingame, CA (03-AP-144) (on behalf of himself and 6 colleagues)

C. Brooks Cutter, Esq., Kershaw Cutter Ratinoff & York, LLP, Sacramento, CA (03-AP-308)

Jeffrey B. Demain, Esq., Altshuler, Berzon, et al., San Francisco, CA (03-AP-391)

P. Cameron DeVore, Esq., Davis Wright Tremaine LLP, Seattle, WA (03-AP-107)

Wendeline De Zan, Esq., Los Angeles, CA (03-AP-493)

Kathryn E. Dobel, Esq., Berkeley, CA (03-AP-042)

Melinda Eades, Esq., Los Angeles, CA (03-AP-325)

Gregory S. Emerson, Esq., Harrington, Foxx, Dubrow & Canter, LLP, Los Angeles, CA (03-AP-504)

Stephen R. English, Esq., English, Munger & Rice, Los Angeles, CA (03-AP-353)

Gabriel A. Espinosa, Esq., Law Offices of H. Joseph Nourmand, Los Angeles, CA (03-AP-090)

Jerome B. Falk, Jr., Esq., Howard, Rice, et al., San Francisco, CA (03-AP-151)

Justin Farar, Esq., Los Angeles, CA (03-AP-187)

Douglas Feick, Esq., Menlo Park, CA (03-AP-264)

Gregory S. Fisher, Esq., Jaburg & Wilk, P.C., Phoenix, AZ (03-AP-049)

Troy Foster, Esq., Palo Alto, CA (03-AP-348)

Donald S. Frick, Esq., Sacramento, CA (03-AP-176)

Gretchen Fusilier, Esq., Carlsbad, CA (03-AP-183)

Albert S. Goldbert, Esq., Goldbert & Associates, Los Angeles, CA (03-AP-420)

Michael L. Goldman, Esq., Palo Alto, CA (03-AP-381)

Paul Grossman, Esq., Paul, Hastings, Janofsky & Walker, Los Angeles, CA (03-AP-263)

Andrew J. Guilford, Esq., Costa Mesa, CA (03-AP-387)

Gayle D. Gunkut, Esq., The Williams Law Firm, Newport Beach, CA (03-AP-018)

Leslie A. Hakala, Esq., Los Angeles, CA (03-AP-161)

Martha Hall, Esq., DiIorio & Hall, A.P.C., San Diego, CA (03-AP-154)

Nicole Hancock, Esq., Stoel Rives LLP, Boise, ID (03-AP-152)

Christopher Hays, Esq., San Francisco, CA (03-AP-037)

L. Rachel Helyar, Esq., Akin Gump et al., Los Angeles, CA (03-AP-455)

John Henry Hingson III, Esq., Oregon City, OR (03-AP-511)

Robert A. Holland, Esq., Sidley Austin Brown & Wood LLP, Los Angeles, CA (03-AP-331)

Ellis J. Horvitz, Esq., Horvitz & Levy LLP, Encino, CA (03-AP-103)

Shirley M. Hufstedler, Esq., Morrison & Foerster LLP, Los Angeles, CA (03-AP-106)

Sandra S. Ikuta, Esq., O'Melveny & Myers LLP, Los Angeles, CA (03-AP-085)

Mark B. Jacobs, Esq., Harvey Siskind Jacobs LLP, San Francisco, CA (03-AP-070)

Knut S. Johnson, Esq., San Diego, CA (03-AP-175)

Eric H. Joss, Esq., Paul, Hastings, Janofsky & Walker LLP, Los Angeles, CA (03-AP-262)

Hayward J. Kaiser, Esq., Los Angeles, CA (03-AP-202)

Raoul D. Kennedy, Esq., Skadden Arps et al., San Francisco, CA (03-AP-255)

Kelly M. Klaus, Esq., Munger, Tolles & Olson LLP, Los Angeles, CA (03-AP-336)

Kenneth N. Klee, Esq., Klee, Tuchin, Bogdanoff & Stern LLP, Los Angeles, CA (03-AP-084)

Cheryl L. Kopitzke, Esq., Mitchell, Silberberg & Knupp LLP, Los Angeles, CA (03-AP-044)

Theodore J. Kozloff, Esq., Skadden, Arps, et al., San Francisco, CA (03-AP-141)

Stephen A. Kroft, Esq., McDermott, Will & Emery, Los Angeles, CA (03-AP-101)

Karen L. Landau, Esq., Oakland, CA (03-AP-247)

J. Al Latham, Jr., Esq., Paul, Hastings, Janofsky & Walker LLP, Los Angeles, CA (03-AP-259)

Robert LeMoine, Esq., Los Angeles, CA (03-AP-326)

Ingrid Leverett, Esq., Krieg, Keller, et al., San Francisco, CA (03-AP-276)

Susan Lew, Esq., Court Attorney, San Francisco Superior Court, San Francisco, CA (03-AP-257)

Eric C. Liebeler, Esq., Kirkland & Ellis LLP, Los Angeles, CA (03-AP-025)

Ethan Lipsig, Esq., Paul, Hastings, Janofsky & Walker, LLP, Los Angeles, CA (03-AP-425)

Jonathan A. Loeb, Esq., Alschuler Grossman Stein & Kahan LLP, Santa Monica, CA (03-AP-146)

Patricia Lofton, Esq., Horvitz & Levy LLP, Encino, CA (03-AP-203)

Michael E. Lopez, Esq., Quinn Emanuel et al., Los Angeles, CA (03-AP-207)

David M. Luboff, Esq., Jaffe & Clemens, Beverly Hills, CA (03-AP-204)

Elwood Lui, Esq., and Alan E. Friedman, Esq., Jones Day, Los Angeles, CA (03-AP-444)

Christian E. Mammen, Esq., San Francisco, CA (03-AP-345) (on behalf of himself and 2 colleagues)

Richard D. Marks, Esq., Law Offices of Richard D. Marks, Calabasas, CA (03-AP-196)

Shaun S. McCrea, Esq., McCrea, P.C., Eugene, OR (03-AP-510)

Robin Meadow, Esq., Greines, Martin, Stein & Richland LLP, Los Angeles, CA (03-AP-468)

Lynn C. Merring, Esq., Stradling Yocca Carlson & Rauth, Newport Beach, CA (03-AP-481)

Robert A. Merring, Esq., Newport Beach, CA (03-AP-098)

Daniel E. Mitchel, Esq., Reference Librarian, Witkin California State Law Library, Sacramento, CA (03-AP-004)

Guy Mizrahi, Esq., Forgey & Hurrell LLP, Los Angeles, CA (03-AP-311)

W. Dea Montague, Esq., Mesa, AZ (03-AP-188)

Sheryl Musgrove, Esq., Assistant Borough Attorney, Kenai Peninsula Borough, Soldotna, AK (03-AP-087)

Stephen C. Neal, Esq., Palo Alto, CA (03-AP-218)

Gretchen M. Nelson, Esq., Kreindler & Kreindler LLP, Los Angeles, CA (03-AP-352)

Christopher M. Newman, Esq., Irell & Manella, LLP, Los Angeles, CA (03-AP-020)

Gregory Nicolaysen, Esq., Encino, CA (03-AP-178)

William A. Norris, Esq., Akin, Gump, et al., Los Angeles, CA (03-AP-094)

H. Joseph Nourmand, Esq., Los Angeles, CA (03-AP-128)

Michael J. O'Connor, Esq., White O'Connor Curry & Avanzado LLP, Los Angeles, CA (03-AP-341)

Christopher R.J. Pace, Esq., San Diego, CA (03-AP-249)

Holly R. Paul, Esq., Clerk to U.S. Magistrate Judge, Burbank, CA (03-AP-328)

David C. Pauling, Esq., San Mateo, CA (03-AP-220)

Lisa Perrochet, Esq., Horvitz & Levy LLP, Encino, CA (03-AP-150)

Patricia Plunkett, Esq., Legal Research and Writing Instructor, Boalt Hall School of Law, Berkeley, CA (03-AP-437)

Mark S. Pulliam, Esq., San Diego, CA (03-AP-197)

Bruce M. Ramer, Esq., Gang, Tyre, Ramer & Brown, Beverly Hills, CA (03-AP-365)

Kent L. Richland, Esq., Greines, Martin, Stein & Richland LLP, Los Angeles, CA (03-AP-364)

William T. Rintala, Esq., Rintala, Smoot, Jaenicke & Rees LLP, Los Angeles, CA (03-AP-243)

James M. Rockett, Esq., Bingham McCutchen LLP, San Francisco, CA (03-AP-039)

Robert H. Rotstein, Esq., McDermott, Will & Emery, Los Angeles, CA (03-AP-036)

Andrew E. Rubin, Esq., Los Angeles, CA (03-AP-270)

Harvey I. Saferstein, Esq., Mintz Levin et al., Santa Monica, CA (03-AP-186)

Kelli L. Sager, Esq., Davis Wright Tremaine LLP, Los Angeles, CA (03-AP-343)

S. Ann Salisbury, Esq., Kutak Rock LLP, Pasadena, CA (03-AP-419)

David A. Schwarz, Esq., Irell & Manella LLP, Los Angeles, CA (03-AP-362)

Gerald Serlin, Esq., Benedon & Serlin, Woodland Hills, CA (03-AP-057)

Charles M. Sevilla, Esq., Cleary & Sevilla, LLP, San Diego, CA (03-AP-099)

K. John Shaffer, Esq., Los Angeles, CA (03-AP-376)

Rosetta Shatkin, Esq., Oakland, CA (03-AP-127)

Janet Sherman, Sherman & Sherman, Santa Monica, CA (03-AP-489)

Victor Sherman, Sherman & Sherman, Santa Monica, CA (03-AP-488)

Robert Sargent Shriver III, Esq., Beverly Hills, CA (03-AP-031)

Lawrence J. Siskind, Esq., Harvey Siskind Jacobs LLP, San Francisco, CA (03-AP-073)

Gerald Smith, Esq., Benedon & Serlin, Woodland Hills, CA (03-AP-079)

Chris Sprigman, Esq., Center for Internet and Society, Stanford Law School, Stanford, CA (03-AP-033)

David M. Stern, Esq., Klee, Tuchin, Bogdanoff & Stern LLP, Los Angeles, CA (03-AP-337)

Guy W. Stilson, Esq., Low, Ball & Lynch, San Francisco, CA (03-AP-051)

John A. Taylor, Jr., Esq., Horvitz & Levy LLP, Encino, CA (03-AP-232)

W. John Thiel, Esq., Holland & Thiel, Boise, ID (03-AP-180)

Michael D. Thomas, Esq., Nixon Peabody LLP, San Francisco, CA (03-AP-423)

Marcy J. Tiffany, Esq., Wyner & Tiffany, Torrance, CA (03-AP-166)

Nancy Tompkins, Esq., Townsend and Townsend and Crew LLP, San Francisco, CA (03-AP-277)

John Trasvina, Esq., San Francisco, CA (03-AP-055)

Anne M. Voigts, Esq., Pacifica, CA (03-AP-482)

Monica J. Wahl, Esq., CA (03-AP-373)

Paul J. Watford, Esq., Munger, Tolles & Olson LLP, Los Angeles, CA (03-AP-113)

Elia Weinbach, Esq., Mitchell, Silberberg & Knupp LLP, Los Angeles, CA (03-AP-023)

Don Willenburg, Esq., Carroll, Burdick & McDonough LLP, San Francisco, CA (03-AP-123)

J. Craig Williams, Esq., The Williams Law Firm, Newport Beach, CA (03-AP-017)

Stephanie Rae Williams, Esq., Sedgwick, Detert, Moran & Arnold LLP, Los Angeles, CA (03-AP-316) (on behalf of herself and 3 colleagues)

Barbara A. Winters, Esq., Howard Rice et al., San Francisco, CA (03-AP-483)

Victor H. Woodworth, Esq., Newport Beach, CA (03-AP-224)

Steven Wyner, Esq., Wyner & Tiffany, Torrance, CA (03-AP-034)

Stephen Yagman, Esq., Yagman & Yagman & Reichmann & Bloomfield, Venice Beach, CA (03-AP-234)

Michael D. Young, Esq., Weston Benshoof et al., Los Angeles, CA (03-AP-109)

Martin Zankel, Esq., Bartko, Zankel, Tarrant & Miller, San Francisco, CA (03-AP-041)

Tenth Circuit

John A. Darden, Esq., The Darden Law Firm P.A., Las Cruces, NM (03-AP-019)

Eleventh Circuit

Stephen N. Bernstein, Esq., Stephen N. Bernstein, P.A., Gainesville, FL (03-AP-475)

Barry W. Beroset, Esq., Beroset & Keene, Pensacola, FL (03-AP-463)

Michael T. Burns, Esq., Sarasota, FL (03-AP-503)

John P. Cardillo, Esq., Cardillo, Keith & Bonaquist, Naples, FL (03-AP-512)

Barry A. Cohen, Esq., Cohen, Jayson & Foster, P.A., Tampa, FL (03-AP-363)

Bradley A. Conway, Esq., Bradley A. Conway, P.A., Orlando, FL (03-AP-448)

Kevin A. Cranman, Esq., Atlanta, GA (03-AP-299)

Armando Garcia, Esq., Garcia and Seliger, Quincy, FL (03-AP-451)

Mary Eugenia Gates, Esq., Law Clerk, U.S. Court of Appeals for the Eleventh Circuit, Atlanta, GA (03-AP-502)

Walter L. Grantham, Jr., Esq., Clearwater, FL (03-AP-476)

Robert S. Griscti, Esq., Gainesville, FL (03-AP-497)

Joel Hirschhorn, Esq., Hirschhorn & Bieber, P.A., Coral Gables, FL (03-AP-500)

James K. Jenkins, Esq., Maloy & Jenkins, Atlanta, GA (03-AP-275)

Kirk N. Kirkconnell, Esq., Kirkconnell, Lindsey, Snure & Yates, P.A., Winter Park, FL (03-AP-494)

Peter Kontio, Esq., and Todd David, Esq., Alston & Bird LLP, Atlanta, GA (03-AP-470)

Louis Kwall, Esq., Kwall, Showers & Coleman, P.A., Clearwater, FL (03-AP-447)

David R. Parry, Esq., Bauer, Crider, Pellegrino & Parry, Clearwater, FL (03-AP-424)

Christopher P. Saxer, Esq., Fort Walton Beach, FL (03-AP-480)

Wilbur C. Smith III, Esq., The Wilbur Smith Law Firm, PLLC, Fort Myers, FL (03-AP-495)

Mark Snyderman, Esq., Dunwoody, GA (03-AP-472)

Alan R. Soven, Esq., Miami, FL (03-AP-452)

Overseas

John McGuire, Esq., Cleary, Gottlieb, Steen & Hamilton, London, England (03-AP-407)

Igor V. Timofeyev, Esq., Associate Legal Officer, Office of the President, International Criminal Tribunal for the Former Yugoslavia, The Hague, Netherlands (03-AP-411)

Jana L. Torok, Esq., Camp Casey, Korea (03-AP-236)

In-House Attorneys

D.C. Circuit

John P. Frantz, Esq., Verizon Communications, Washington, D.C. (03-AP-261)

Second Circuit

William P. Barr, Esq., Executive Vice President and General Counsel, Verizon, New York, NY (03-AP-272)

Paul T. Cappuccio, Esq., Executive Vice President and General Counsel, Time Warner Inc., New York, NY (03-AP-064)

Ninth Circuit

Marc D. Bond, Esq., Assistant Counsel, Law Department, Union Oil Company of California, Anchorage, AK (03-AP-058)

Jeffrey B. Coyne, Esq., Vice President, General Counsel, and Corporate Secretary, Newport Corporation, Irvine, CA (03-AP-145)

James R. Edwards, Esq., Senior Legal Counsel, Corporate Legal Department, Qualcomm, San Diego, CA (03-AP-120)

Gregory T.H. Lee, Esq., President, Eureka Casinos, Las Vegas, NV (03-AP-157)

John M. Nettleton, Esq., Corporate Counsel, Starbucks Coffee Company, Seattle, WA (03-AP-226)

Adam J. Pliska, Esq., Director of Business & Legal Affairs, World Poker Tour, West Hollywood, CA (03-AP-440)

Sheldon W. Presser, Esq., Senior Vice President & Deputy General Counsel, Warner Bros. Entertainment Inc., Burbank, CA (03-AP-346)

Jerri L. Solomon, Esq., Senior Corporate Counsel, Farmers Group, Inc., Los Angeles, CA (03-AP-417)

Thomas F. Tait, Esq., President, Tait & Associates, Inc., Santa Ana, CA (03-AP-140)

John Vaughan, Esq., President and CEO, T and T Industries, Inc., Fullerton, CA (03-AP-108)

Eleventh Circuit

Michael Bishop, Esq., Chief Intellectual Property Counsel, BellSouth Corporation, Atlanta, GA (03-AP-315)

Deval L. Patrick, Esq., Executive Vice President, General Counsel, and Corporate Secretary, The Coca-Cola Company, Atlanta, GA (03-AP-027)

Non-Attorneys or Status Not Clear

Fifth Circuit

Roberta Gonzalez, Pflugerville, TX (03-AP-118)

Seventh Circuit

Carole Tkacz, Gary, IN (03-AP-163)

Ninth Circuit

Dr. Philip K. Anthony, CEO, Bowne DecisionQuest, Torrance, CA (03-AP-206)

Chris L. Britt, President, Marwit Capital, Newport Beach, CA (03-AP-147)

Hartwell Harris, Law Student, Boalt Hall School of Law, Berkeley, CA (03-AP-205)

Mark Kerslake, Province Group, Newport Beach, CA (03-AP-143)

Farahnaz Nourmand, Los Angeles, CA (03-AP-089)

Bethany L. O'Neill, San Diego, CA (03-AP-189)

John A. Sandberg, President, Sandberg Furniture, Los Angeles, CA (03-AP-148)

Homan Taghdiri, Los Angeles, CA (03-AP-088)

Wayne Willis, Los Altos, CA (03-AP-300)

Unknown

Katherine Kimball Windsor (03-AP-241)

Organizations

ACLU Foundation of Southern California, Los Angeles, CA (03-AP-235)

Advisory Council of the United States Court of Appeals for the Federal Circuit, Washington, DC (03-AP-410) (Carter G. Phillips, Esq., testified at 4/13 hearing)

Appellate Courts Committee, Los Angeles County Bar Association, Los Angeles, CA (03-AP-201)

Attorney General's Office, State of California, Sacramento, CA (03-AP-395)

Attorney General's Office, State of Washington, Olympia, WA (03-AP-382)

California La Raza Lawyers Association, Los Angeles, CA (03-AP-268)

Committee on Appellate Courts, State Bar of California, San Francisco, CA (03-AP-319) (John A. Taylor, Jr., Esq., testified at 4/13 hearing)

Committee on Federal Courts, State Bar of California, San Francisco, CA (03-AP-393)

Federal Circuit Bar Association, Washington, DC (03-AP-409)

Hispanic National Bar Association, Washington, DC (03-AP-415)

Litigation Section, Los Angeles County Bar Association, Los Angeles, CA (03-AP-347)

Northern District of California Chapter, Federal Bar Association, San Francisco, CA (03-AP-374)

Orange County Chapter, Federal Bar Association, Irvine, CA (03-AP-429)

ii. Commentators Who Favor Proposed Rule

Federal Circuit Court Judges

Judge Edward R. Becker (CA3) (Judge Becker testified at 4/13 hearing)

Judge Frank H. Easterbrook (CA7) (03-AP-367)

Judge David M. Ebel (CA10) (03-AP-010)

Judge Kenneth F. Ripple (CA7) (03-AP-335)

Judge A. Wallace Tashima (CA9) (03-AP-288)

Law Professors

Prof. Stephen R. Barnett, Boalt Hall School of Law (03-AP-032) (Prof. Barnett testified at 4/13 hearing)

Prof. Richard B. Cappalli, Temple University, James E. Beasley School of Law (03-AP-435)

Prof. Andrew M. Siegel, University of South Carolina School of Law (03-AP-219)

Prof. Michael B.W. Sinclair, New York Law School (03-AP-283)

Attorneys in Private or Government Practice

D.C. Circuit

Ashley Doherty, Esq., Washington, DC (03-AP-225)

Elizabeth J. Pawlak, Esq., Pawlak & Associates, Washington, DC (03-AP-449)

Second Circuit

Philip Allen Lacovara, Esq., Mayer, Brown, Rowe & Maw LLP, New York, NY (03-AP-016)

Steven I. Wallach, Morrison Cohen Singer & Weinstein, LLP, New York, NY (Mr. Wallach testified at 4/13 hearing)

Third Circuit

David R. Fine, Esq., Kirkpatrick & Lockhart LLP, Harrisburg, PA (03-AP-223)

James L. Martin, Esq., Wilmington, DE (03-AP-513)

Fourth Circuit

Dr. Mark S. Bellamy, Esq., Virginia Beach, VA (03-AP-324)

Kerry Hubers, Esq., Alexandria, VA (03-AP-209)

Roy M. Jessee, Esq., Mullins, Harris & Jessee, P.C., Norton, VA (03-AP-230)

Steven R. Minor, Esq., Elliott Lawson & Minor, Bristol, VA (03-AP-210)

Fifth Circuit

Stephen R. Marsh, Esq., Wichita Falls, TX (03-AP-216)

Sixth Circuit

Kurt L. Grossman, Wood, Herron & Evans LLP, Cincinnati, OH (03-AP-426)

Charles E. Young, Jr., Esq., Knoxville, TN (03-AP-214)

Seventh Circuit

Beverly B. Mann, Esq., Chicago, IL (03-AP-408)

Eighth Circuit

Mark G. Arnold, Esq., Husch & Eppenberger, LLC, St. Louis, MO (03-AP-002)

Hugh R. Law, Esq., Lowenhaupt & Chasnoff, LLC, St. Louis, MO (03-AP-212)

David J. Weimer, Esq., Kramer & Frank, P.C., Kansas City, MO (03-AP-005)

Ninth Circuit

Anonymous (03-AP-238)

Gary Michael Coutin, Esq., San Francisco, CA (03-AP-465)

David W. Floren, Esq., Santa Rosa, CA (03-AP-227)

James B. Friderici, Esq., Delaney, Wiles, et al., Anchorage, AK (03-AP-006)

Robert Don Grifford, Esq., Reno, NV (03-AP-213)

Robert L. Jovick, Esq., Livingston, MT (03-AP-508)

James B. Morse, Jr., Esq., Tempe, AZ (03-AP-222)

Kenneth J. Schmier, Esq., Committee for the Rule of Law, Emeryville, CA (03-AP-239)

Jonathan M. Shaw, Esq., Susman Godfrey LLP, Seattle, WA (03-AP-208)

Leslie R. Weatherhead, Esq., Witherspoon, Kelley, Davenport & Toole, Spokane, WA (03-AP-473)

Tenth Circuit

Daniel E. Monnat, Esq., Monnat & Spurrier, Wichita, KS (03-AP-271)

Samuel M. Ventola, Esq., Rothgerber, Johnson & Lyons, Denver, CO (03-AP-217)

Eleventh Circuit

J. Christopher Desmond, Esq., Law Clerk, U.S. District Court for the Southern District of Georgia, Savannah, GA (03-AP-211)

Michael N. Loebl, Esq., Fulcher, Hagler, et al., Augusta, GA (03-AP-454)

Craig N. Rosler, Esq., Birmingham, AL (03-AP-149)

In-House Attorneys

Ira Brad Matetsky, General Counsel, Goya Foods, Inc., Secaucus, NJ (03-AP-434)

Non-Attorneys or Status Not Clear

Jacob Aftergood, Santa Cruz, CA (03-AP-265)

Steven A. Aftergood, Washington, DC (03-AP-286)

Debra D. Coplan, Los Angeles, CA (03-AP-323)

Paul Freda, Los Gatos, CA (03-AP-284)

Laurence Neuton, Los Angeles, CA (03-AP-317)

Organizations

American Bar Association, Chicago, IL (Judah Best, Esq., testified at 4/13 hearing)

American College of Trial Layers, Irvine, CA (William T. Hangley, Esq., and James W. Morris III, Esq., testified at 4/13 hearing)

Association of the Bar of the City of New York and the Association's Committee on Federal Courts, New York, NY (03-AP-464)

Brennan Center for Justice, New York University School of Law, New York, NY (Jessie Allen, Esq., testified at 4/13 hearing)

Citizens for Voluntary Trade, Arlington, VA (03-AP-414; 03-AP-456)

Committee on Courts of Appellate Jurisdiction, New York State Bar Association, Albany, NY (03-AP-097)

Committee on U.S. Courts, State Bar of Michigan, Lansing, MI (03-AP-394)

Public Citizen Litigation Group, Washington, DC (03-AP-008; 03-AP-487) (Brian Wolfman, Esq., testified at 4/13 hearing)

Social Security Administration, Baltimore, MD (03-AP-491)

Trial Lawyers for Public Justice and the TLPJ Foundation, Washington, DC (03-AP-406) (Richard Frankel, Esq., testified at 4/13 hearing)

F. Rule 35(a)

1. Introduction

Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits follow two different approaches when one or more active judges are disqualified. Seven circuits follow the "absolute majority" approach (disqualified judges count in the base in considering whether a "majority" of judges have voted for hearing or rehearing en banc), while six follow the "case majority" approach (disqualified judges do not count in the base). Two circuits — the First and the Third — explicitly qualify the case majority approach by providing that a majority of all judges — disqualified or not — must be eligible to participate in the case; it is not clear whether the other four case majority circuits agree with this qualification.

The Committee proposes amending Rule 35(a) to adopt the case majority approach.

2. Text of Proposed Amendment and Committee Note

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or

reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

* * * * *

Committee Note

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had 8 active judges at the time; 4 voted in favor of rehearing the case, 2 against, and 2 abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but

instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in § 46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, 7 of the courts of appeals follow the "absolute majority" approach. *See* Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

Six of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The First and Third Circuits explicitly qualify the case majority approach by providing that a case cannot be heard en banc unless a majority of all

active judges — disqualified and non-disqualified — are eligible to participate.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

The case majority approach represents the better interpretation of the phrase "the circuit judges . . . in regular active service" in the first sentence of § 46(c). The second sentence of § 46(c) — which defines which judges are eligible to participate in a case being heard or reheard en banc — uses the similar expression "all circuit judges in regular active service." It is clear that "all circuit judges in regular active service" in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc. Therefore, assuming that two nearly identical phrases appearing in adjacent sentences in a statute should be interpreted in the same way, the best reading of "the circuit judges . . . in regular active service" in the first sentence of § 46(c) is that it, too, does not include disqualified judges.

This interpretation of § 46(c) is bolstered by the fact that the case majority approach has at least two major advantages over the absolute majority approach:

First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. This defeats the purpose of recusal. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc.

Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). Even though the en banc court may, in a future case, be able to correct an erroneous legal interpretation, the en banc court will never be able to correct the injustice inflicted by the panel on the parties to the case. Morever, it may take many years before sufficient non-disqualified judges can be mustered to overturn the panel's erroneous legal interpretation. In the meantime, the lower courts of the circuit must apply — and the citizens of the circuit must conform their behavior to — an interpretation of the law that almost all of the circuit's active judges believe is incorrect.

The amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d). In particular, the amendment is not intended to foreclose the possibility that § 46(d) might be read to require that more than half of all circuit judges in

regular active service be eligible to participate in order for the court to hear or rehear a case en banc.

---

3. Changes Made After Publication and Comments

No changes were made to the text of the proposed amendment. The Committee Note was modified in three respects. First, the Note was changed to put more emphasis on the fact that the case majority rule is the best interpretation of § 46(c). Second, the Note now clarifies that nothing in the proposed amendment is intended to foreclose courts from interpreting 28 U.S.C. § 46(d) to provide that a case cannot be heard or reheard en banc unless a majority of all judges in regular active service — disqualified or not — are eligible to participate. Finally, a couple of arguments made by supporters of the amendment to Rule 35(a) were incorporated into the Note.

4. Summary of Public Comments

David J. Weimer, Esq. (03-AP-005) supports the proposed amendment.

The **Public Citizen Litigation Group** (03-AP-008) "strongly" supports the proposed amendment.

Chief Judge Michael Boudin of the First Circuit (03-AP-009; 03-AP-192) reports that his court has abandoned the absolute majority approach in favor of the qualified case majority approach. He also reports that the First Circuit supports the proposed amendment to Rule 35(a), with one important proviso. Judge Boudin draws the attention of the Committee to 28 U.S.C. § 46(d), which provides: "A majority of the number of judges authorized to

constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum." In Judge Boudin's view, this provision *requires* the "qualification" in the "qualified case majority rule" — that is, the qualification that a case cannot be heard or reheard en banc unless a majority of *all* judges in regular active service are eligible to participate. Judge Boudin believes that the omission of an explicit quorum requirement in the proposed amendment to Rule 35(a) "is not a problem so long as the committee notes . . . make clear that the unqualified rule you propose is not intended to override any existing quorum requirement embodied in section 46(d) or — if I have misread that section — any quorum requirement that a court of appeals might reasonably adopt."

Judge J. Harvie Wilkinson III of the Fourth Circuit (03-AP-012) opposes the proposed amendment. He is "not certain why a difference in circuit practice needs to be replaced by a uniform command," especially as "[t]his is not the type of rule that affects filing deadlines or to which practitioners need to conform their conduct." He is also concerned that, under the proposed amendment, "the en banc court could be convened by less than a majority of the active judges, and that a disposition could issue from a majority of the reduced court" — something that he believes would "undermine the purpose of an institutional voice for which the en banc court was designed." Finally, he is also concerned that the proposed amendment would result in an increase in the number of en banc proceedings, consuming much-needed resources and possibly aggravating internal tensions within courts.

Chief Judge William W. Wilkins of the Fourth Circuit (03-AP-013) opposes the proposed amendment for the reasons given by Judge Wilkinson.

Philip Allen Lacovara, Esq. (03-AP-016) supports the proposed amendment: "The Advisory Committee's proposal for a single, national approach is sound. It represents a reasonable interpretation of the governing statute, 28 U.S.C. § 46(c). By analogy to the '*Chevron* doctrine,' the Advisory Committee's interpretation of the range of permissible options deserves deference."

Chief Judge Haldane Robert Mayer of the Federal Circuit (03-AP-086) reports that the judges on the Federal Circuit — which currently follows the absolute majority rule — unanimously oppose the proposed amendment. The courts of appeals should be left to interpret Rule 35(a) inconsistently. If uniformity is to be imposed, it should be the absolute majority approach followed by a majority of the circuits, not the case majority approach followed by a minority. The case majority approach is deficient in permitting a small number of judges to issue opinions on behalf of the en banc court; for example, on a 12-member court with 5 members disqualified, 4 judges could issue en banc opinion binding all 12 judges on the court, even if 8 of the 12 judges do not agree with it. En banc review is reserved for cases of exceptional important (or cases involving a conflict of authority), and such cases should be decided only by an absolute majority of judges. Finally, although national uniformity may be important with respect to rules that govern the conduct of the parties, it is not as important when it comes to the internal procedures of each court.

The **Appellate Courts Committee of the Los Angeles County Bar Association** (03-AP-201) supports the proposed amendment, as it is "sensible" to "standardize" en banc procedures and to "exclude from the count those judges who are disqualified."

Senior Judge S. Jay Plager of the Federal Circuit (03-AP-297) agrees with Judge Mayer.

The **Committee on Appellate Courts of the State Bar of California** (03-AP-319) "fully supports" the proposed amendment. Practice on this issue should not vary from circuit to circuit. Moreover, the absolute majority approach is objectionable because, under it, "the disqualification of a judge is essentially deemed as a vote against granting an en banc hearing," which is "contrary to the purpose of a judge recusing him/herself."

Chief Judge Douglas H. Ginsburg of the D.C. Circuit (03-AP-368) reports that a majority of the active judges of the D.C. Circuit oppose the proposed amendment for the reasons described by Judge Mayer.

Prof. Arthur D. Hellman of the University of Pittsburgh School of Law (03-AP-369) strongly supports the proposed amendment, largely for the reasons given by Judge Edward Carnes in his *Gulf Power Co.* opinion. Prof. Hellman writes mainly to respond to the arguments of Judge Mayer:

> Judge Mayer objects that the case majority rule permits a minority of judges to control the law of the circuit. What Judge Mayer fails to acknowledge is that the absolute majority approach does exactly the same thing -- and makes such a phenomenon both more likely and more pernicious. Under the absolute majority approach, a three-judge panel — perhaps a panel with one senior judge and one visiting judge in the majority, and one active judge in dissent — can decide a case in a manner that is acceptable to *no* active judge. If 6 of the circuit's 12 judges are disqualified, there is nothing that the circuit can do to correct the error.
>
> If the panel's error is one of creating law, then the circuit may be able to take another case presenting the same issue en banc in a few years — that is, if a majority of nondisqualified judges can be

mustered. (The stock holdings of the judges and a lack of turnover on the court might mean that it will be many years before a majority of nonrecused judges will be available.) In the meantime, the lower courts of the circuit are stuck applying bad law, and the citizens of the circuit are stuck conforming their behavior to bad law.

Importantly, though, the en banc court will *never* get a chance to correct the injustice inflicted on the parties in the particular case. "[T]he absolute majority rule disables the only *relevant* majority from working its will at the only time when it matters." One function of the appellate courts is to declare and clarify law, but the more important function is to do justice in individual cases.

Judge Mayer's further argument that this issue merely relates to "the internal procedures of each court" ignores one crucial point: "By definition, a judge who is recused from participation in a case should have no influence over that case's outcome. Yet under the absolute majority rule, nonparticipation is equivalent to a 'no' vote." In other words, use of the absolute majority rule is not just a matter of how paper is pushed inside a circuit; it directly affects the rights of the parties. "Recused judges . . . have a direct influence over the outcome of the case," which violates the very notion of recusal.

Prof. Hellman points out that these concerns led to inclusion in the Judicial Improvements Act of 2002 of a provision that would have amended 28 U.S.C. § 46(c) to more clearly impose the case majority rule. That provision was dropped from the bill (which eventually became law) because Congress was informed that the Committee was actively addressing the issue. Prof. Hellman hints that if the proposed amendment to Rule 35(a) is not enacted, Congress may very well impose the case majority rule itself.

The **Committee on Federal Courts of the State Bar of California** (03-AP-393) supports the proposed amendment, largely for the reasons described in the Advisory Committee Note. The Committee believes that fundamental fairness requires that parties be treated alike under the same statute and rule, no matter the circuit in which the parties are litigating. The Committee also believes that recusal of a judge should not result in the equivalent of a vote against rehearing. Finally, the Committee criticizes the absolute majority approach because it can leave the en banc court helpless to overturn a panel decision with which all or almost all of the active judges disagree.

Citizens for Voluntary Trade (03-AP-414) supports the proposed amendment. The argument of the Federal Circuit that each circuit should be free to choose its own approach has already been rejected by Congress (which enacted a national statute) and the Supreme Court (which promulgated a national rule). The specter of a minority of active judges issuing an en banc opinion for the court — which can occur under the case majority approach — is not terribly troubling, given that several circuits have already adopted the case majority approach and given that *every* en banc opinion of the Ninth Circuit is issued by a minority of active judges (sometimes by less than a quarter of the active judges). More importantly, counting recused judges in the base violates general principles of parliamentary law and unfairly prejudices the litigant seeking rehearing, because it counts each recused judge as the equivalent of a vote against rehearing.

Chief Judge James B. Loken of the Eighth Circuit (03-AP-499) reports that "[t]en of the eleven Eighth Circuit judges who responded on this question, including all eight active judges, join the Federal Circuit in opposing the adoption of proposed Rule 35(a)." Those judges opposed Rule 35(a) because they did not believe that a

national rule is "necessary [ ]or appropriate." In addition, some judges opposed Rule 35(a) because the case majority rule makes en banc rehearings more likely — and such rehearings "require a large investment of our widely-dispersed judicial resources, a geographical factor that is doubtless not uniform among the circuits."

The **Style Subcommittee** (04-AP-A) makes no suggestions.

III. Information Items

At the request of the E-Government Subcommittee, the Advisory Committee discussed a proposed new Appellate Rule 25.1, which would, among other things, require parties to redact certain personal identifiers from court filings and forbid electronic access to most parts of the record in Social Security Act cases. Proposed Rule 25.1 was based on a template drafted by Prof. Capra, which, in turn, reflected a great deal of work done by the Committee on Court Administration and Case Management.

The Advisory Committee expressed a number of concerns about the approach reflected in proposed Rule 25.1. Those concerns are described at pages 48 to 49 of the minutes of our April meeting.

Milberg Weiss Bershad Hynes & Lerach LLP
100 Pine Street, 26th Floor, San Francisco, CA 94111
(415) 288-4545 Fax: (415) 288-4534

www.milberg.com

New York
San Diego
Los Angeles
Boca Raton
Seattle

Sanford Svetcov
sandys@mwbhl.com

April 22, 2004

Professor Patrick Schiltz
University of St. Thomas School of Law
1000 LaSalle Avenue – MSL 400
Minneapolis, MN 55403-2015

Re: *Minority Report – Federal Appellate Rules Committee – Re: Rule 32.1*

Dear Professor Schiltz:

I write to formally dissent from the Appellate Rules Committee majority vote to recommend adoption of Rule 32.1. Please attach it to the Committee's report.

Apart from the pros and cons of whether citation of non-precedential decisions is appropriate, for me the dispositive points are (1) the consensus of support usually required for adoption of a new rule is lacking as is evident from the 100:1 ratio of comments from judges and lawyers opposing the rule, and (2) the diversity in circuit operating procedures in the preparation and use of non-precedential dispositions far outweighs the desire or need for uniformity in this area of practice.

Four circuits, the Second, Seventh, Ninth and Federal Circuits restrict the citation of non-precedential dispositions. During the committee hearings, and in written comments, we heard testimony from judges of these circuits on the wide disparities in rates of publication in the circuits. In the Seventh and D.C. Circuits, 57% of the dispositions are unpublished, 43% are published. But in the Fifth and Eleventh Circuits, 87% are unpublished and only 13% are published. The Circuit average for 27,000 dispositions last year was 20% published, 80% unpublished. In the Ninth Circuit, there were 777 published decisions, but over 4,000 unpublished.

The unpublished decisions themselves run the gamut from one to two pages summary orders, to four to five page memorandum dispositions without recitation of facts, to full merits decisions with facts and analysis applying settled law to a variety of factual circumstances. Some of these are prepared in chambers, often after oral argument, others by staff attorneys, through various screening mechanisms.

Such diverse practices lead me to conclude that until there is a greater consensus in both viewpoint and practice than is presently shown, the question of citation of non-

precedential disposition should remain a matter of circuit option. Although judges on our committee whose views I respect do not believe their work will be affected, we heard substantial testimony from other judges I respect that their work would be seriously impacted. Such disparate views further support circuit option.

On the merits, I see no need for unlimited citation of non-precedential decisions. Citation serves no useful function unless there is no other published precedent on point available, or to show a conflict with an earlier unpublished disposition on identical facts – which would surely be rare. But proposed Rule 32.1 is not limited to those situations. Further, if the purpose of the proposed rule is merely to allow citation for persuasive value, that can be achieved simply by incorporating the reasoning of the disposition in a brief with citation to the closest available published precedent. The unstated reason for citation of an unpublished disposition is to enable counsel to suggest that three circuit judges signed on to the language or reasoning of the disposition – which often is not the case. In that sense, citation to unpublished dispositions would be misleading.

Finally, and perhaps most importantly, the Standing Committee should consider whether citation to unpublished decisions will give the government an undue litigation advantage. As a prosecutor for 25 years, and defense counsel for 14½ years, I have seen countless criminal convictions ***affirmed*** by unpublished dispositions, but rarely is a conviction reversed without publication. The published law is already heavily weighted in favor of the government. When a huge body of unpublished case law is added, the ability of defense lawyers to develop nuanced arguments, particularly in seeking to protect Fourth Amendment rights, may be blocked by unpublished decisions disposing of the legal issue in a less favorable factual setting.

For these reasons, I respectfully dissent from the Appellate Rules Committee's recommendation and urge the Standing Committee to reject Rule 32.1.

Very truly yours,

Sanford Svetcov

SS:tjl
cc: Honorable Samuel A. Alito
Honorable Thomas S. Ellis III
John K. Rabiej

opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished' opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an "unpublished" opinion can now directly bring that "unpublished" opinion to the court's attention, and the court can do whatever it wishes with that opinion.

Subdivision (b). Under Rule 32.1(b), a party who cites an "unpublished" opinion must provide a copy of that opinion to the court and to the other parties, unless the "unpublished" opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an "unpublished" opinion must file and serve the copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the "unpublished" opinions cited in their briefs or other papers (unless the court generally requires parties to file or serve copies of *all* of the judicial opinions that they cite). "Unpublished" opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of "unpublished" opinions, parties should be required to file and serve copies of such opinions only in the circumstances described in Rule 32.1(b).

Judge Alito said that he was taking up proposed Rule 32.1 out of order because it had been the subject of almost all of the testimony that the Committee had heard earlier in the day, and he hoped it would be helpful to begin the discussion of the rule while the testimony was fresh in Committee members' minds. (The Committee discussed Rule 32.1 until about 5:30 p.m., and the Committee continued the discussion after reconvening at 8:30 a.m. the following day.)

Judge Alito outlined the options for the Committee as follows: (1) It could approve the rule as drafted. (2) It could approve the rule with changes. (3) It could postpone action on the

rule in order to study some of the claims made by the commentators. (4) It could remove the rule from its study agenda.

The Committee discussed the merits of Rule 32.1 at considerable length, touching upon many of the arguments that had been made by the commentators, including the commentators who had testified earlier in the day. Every Committee member, save one, spoke in favor of the proposed rule. The members supporting the rule cited a number of considerations, but two were particularly prominent:

First, Committee members argued that the main problem with no-citation rules — and the main reason to approve Rule 32.1 — is that an Article III court should not be able to forbid parties from citing back to it the public actions that the court itself has taken. It is antithetical to American values and to the common law system for a court to forbid a party or an attorney from calling the court's attention to its own prior decisions, from arguing to the court that its prior decisions were or were not correct, and from arguing that the court should or should not act consistently with those prior decisions in the present case. One member called no-citation rules an "extreme" measure. Another member said that it was "ludicrous" that an attorney cannot cite a court's prior decisions to the court itself, but can cite those decisions to virtually everyone else in the world, including other courts. Yet another member — a judge — said that judges should not be the only government officials who can shield themselves from being confronted with their past actions. The member said that, if a party believes that he has acted inconsistently or unfairly, he *wants* to be told about it. Almost all Committee members agreed that, whatever the problems with unpublished opinions, the way to deal with those problems is not to gag attorneys.

Second, Committee members expressed great skepticism about the "parade of horribles" that commentators predict will result from the approval of Rule 32.1. Members pointed out that there was absolutely no evidence that any of these consequences had been experienced by any of the federal or state courts that have abolished or liberalized no-citation rules. One appellate judge said that he thought the arguments were considerably exaggerated; he said that, although his circuit has a relatively liberal citation rule, parties almost never cite unpublished opinions, and, when they do, he and his colleagues are quite capable of dealing with those citations. Another appellate judge said that he, too, was deeply skeptical of the predictions of doom. The briefs he reads almost never cite unpublished opinions, even though his circuit also has a liberal citation rule. A third appellate judge said that his experience was similar. His circuit, too, has a very liberal citation rule, yet attorneys rarely cite unpublished opinions, and those few citations have not caused any problems for him or his colleagues.

One Committee member argued against approving Rule 32.1. He stated that unpublished opinions are "junk law," and courts should be free to instruct parties not to cite them. He also pointed out that federal rulemaking has traditionally and appropriately been a consensus or near-consensus process. There is obviously not a consensus in favor of Rule 32.1; to the contrary, there was overwhelming opposition to it among commentators. Finally, he was

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

TO: **Honorable David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable A. Thomas Small, Chair**
Advisory Committee on Bankruptcy Rules

DATE: **May 17, 2004**

RE: **Report of the Advisory Committee on Bankruptcy Rules**

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 25-26, 2004, at Amelia Island, Florida. The Advisory Committee considered public comments regarding the preliminary draft of proposed amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9006 that were published in August 2003. The Advisory Committee received only seven comments on the proposed amendments to the Rules, and the comments are summarized later in this report. Since no person who submitted a written comment requested to appear at the public hearing scheduled for January 30, 2004, the hearing was canceled. The Advisory Committee recommends that the Standing Committee approve the amendments and transmit them to the Judicial Conference. The proposed amendments and the comments received thereon are set out below in the Action Items section of this report.

Amendments to three Official Forms, Forms 6-G, 16D, and 17, also are recommended for approval by the Standing Committee and transmission to the Judicial Conference. The amendments to Forms 16D and 17 are technical in nature and are necessary because of a previous amendment effective December 1, 2003, that abrogated Official Form 16C. These amendments are

recommended with an effective date of December 1, 2004. The amendments to Official Form 6-G are necessary because of the amendment proposed to Rule 1007 that will become effective no sooner than December 1, 2005. Thus, the recommended effective date for the amendments to Official Form 6-G is December 1, 2005.

The Advisory Committee also studied a number of proposals to amend the Bankruptcy Rules. After careful consideration, the Advisory Committee resolved to recommend that the Standing Committee approve for publication a preliminary draft of proposed amendments to Bankruptcy Rules 1009, 2002, 4002, 7004, and 9001, and to Schedule I of Official Form 6. The Style Consultants to the Standing Committee offered a number of suggestions that were considered by the Advisory Committee's Style Subcommittee, and the proposals set out below in the Action Items section of the report reflect those joint efforts.

II Action Items

A. Proposed Amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9006, and Official Forms 6, 16D, and 17 Submitted for Final Approval by the Standing Committee and Submission to the Judicial Conference.

The Advisory Committee on Bankruptcy Rules recommends that the Standing Committee approve the following amendments for submission to the Judicial Conference.

1. *Public Comment.*

The preliminary draft of the proposed amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9006 was published for comment in August 2003. A public hearing on the preliminary draft was scheduled for January 30, 2004, but there were no requests to appear at the hearing. There were only seven comments on the proposals, and they are summarized below immediately following each of the rules to which the particular comment applied. The Advisory Committee reviewed these comments and approved the amendments to the rules either as published or with slight changes that are described in the Changes Made After Publication section.

2. *Synopsis of Proposed Amendments:*

(a) Rule 1007 is amended to require the debtor in a voluntary case to submit with the petition a list of entities to which notices will be sent in the case. The listed parties are identified as the entities listed or to be listed on Schedules D through H of the Official Forms.

(b) Rule 3004 is amended to conform the rule to § 501(c) of the Bankruptcy Code. The amendment clarifies that the debtor or trustee may not file a proof of claim until after the time for filing a proof by a particular creditor has expired.

(c) Rule 3005 is amended to delete any reference to a creditor filing a proof of claim that supersedes a claim filed on behalf of the creditor by a codebtor. The amendment thus conforms the rule to § 501(b) of the Bankruptcy Code.

(d) Rule 4008 is amended to establish a deadline for filing a reaffirmation agreement with the court. The amendment deletes the former provision of the rule that governed the timing of the reaffirmation agreement and discharge hearing. These restrictions on the court's docket are unduly burdensome and the amendment provides the court with the discretion to set and hold these hearings at appropriate times in the circumstances presented in the case.

(e) Rule 7004 is amended to authorize the clerk specifically to sign, seal, and issue a summons electronically. The amendment does not address the service requirements for a summons which are set out in other provisions of Rule 7004.

(f) Rule 9006 is amended to clarify that the three day period is added to the end of the time period for taking action when service is accomplished through certain specified means. This amendment in intended to conform as closely as possible to the amendment being proposed by the Advisory Committee on Civil Rules.

(g) Schedule G of Official Form 6 is amended to delete the note that informed the preparer of the Schedule that the entities listed on the schedule would not automatically receive notice of the case. The amendment to Rule 1007 will require the person who prepares the schedules to list the entities on the mailing matrix of persons to whom notice of the case will be sent.

(h) Official Form 16D is amended to conform to the changes made by the December 1, 2003, abrogation of Official Form 16C.

(i) Official Form 17 is amended to conform to the changes made by the December 1, 2003, abrogation of Official Form 16C.

3. *Text of Proposed Amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006.*

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1007. Lists, Schedules and Statements; Time Limits

(a) LIST OF CREDITORS AND EQUITY SECURITY HOLDERS.

(1) *Voluntary Case.* In a voluntary case, the debtor shall file with the petition a list containing the name and address of each ~~creditor unless the petition is accompanied by a schedule of liabilities~~ entity included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms.

(2) *Involuntary Case.* In an involuntary case, the debtor shall file within 15 days after entry of the order for relief, a list containing the name and address of each ~~creditor unless a schedule of liabilities has been filed~~ entity included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms.

* * * * *

(c) TIME LIMITS. In a voluntary case, the ~~The~~ schedules and statements, other than the statement of intention, shall be

*New material is underlined; matter to be omitted is lined through.

filed with the petition ~~in a voluntary case~~, or ~~if the petition is accompanied by a list of all the debtor's creditors and their addresses,~~ within 15 days thereafter, except as provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case the list in subdivision (a)(2), and the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days after the entry of the order for relief. ~~Schedules~~ Lists, schedules, and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Any extension of time for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

(g) PARTNERSHIP AND PARTNERS. The general partners of a debtor partnership shall prepare and file the list

required under subdivision (a), the schedules of the assets and liabilities, schedule of current income and expenditures, schedule of executory contracts and unexpired leases, and statement of financial affairs of the partnership. The court may order any general partner to file a statement of personal assets and liabilities within such time as the court may fix.

* * * * *

COMMITTEE NOTE

Notice to creditors and other parties in interest is essential to the operation of the bankruptcy system. Sending notice requires a convenient listing of the names and addresses of the entities to whom notice must be sent, and virtually all of the bankruptcy courts have adopted a local rule requiring the submission of a list of these entities with the petition and in a particular format. These lists are commonly called the "mailing matrix."

Given the universal adoption of these local rules, the need for such lists in all cases is apparent. Consequently, the rule is amended to require the debtor to submit such a list at the commencement of the case. This list may be amended when necessary. See Rule 1009(a).

The content of the list is described by reference to Schedules D through H of the Official Forms rather than by reference to creditors or persons holding claims. The cross reference to the Schedules as the source of the names for inclusion in the list ensures that persons such as codebtors or nondebtor parties to executory contracts and unexpired leases will receive appropriate notices in the case.

While this rule renders unnecessary, in part, local rules on the subject, this rule does not direct any particular format or form for the list to take. Local rules still may govern those particulars of the list.

Subdivision (c) is amended to reflect that subdivision (a)(1) no longer requires the debtor to file a schedule of liabilities with the petition in lieu of a list of creditors. The filing of the list is mandatory, and subdivision (b) of the rule requires the filing of schedules. Thus, subdivision (c) no longer needs to account for the possibility that the debtor can delay filing a schedule of liabilities when the petition is accompanied by a list of creditors. Subdivision (c) simply addresses the situation in which the debtor does not file schedules or statements with the petition, and the procedure for seeking an extension of time for filing.

Other changes are stylistic.

Public Comment on Proposed Amendments to Rule 1007:

No comments were received on these proposed amendments.

Changes Made After Publication and Comment:

No changes since publication.

Rule 3004. Filing of Claims by Debtor or Trustee

If a creditor ~~fails to file~~ does not timely file a proof of claim under Rule 3002(c) or 3003(c), ~~on or before the first date set for the meeting of creditors called pursuant to § 341(a) of the Code,~~ the debtor or trustee may ~~do so in the name of the creditor,~~ file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith ~~mail~~ give notice of the filing to the creditor,

the debtor and the trustee. ~~A proof of claim filed by a creditor pursuant to Rule 3002 or Rule 3003(c), shall supersede the proof filed by the debtor or trustee.~~

COMMITTEE NOTE

The rule is amended to conform to § 501(c) of the Code. Under that provision, the debtor or trustee may file proof of a claim if the creditor fails to do so in a timely fashion. The rule previously authorized the debtor and the trustee to file a claim as early as the day after the first date set for the meeting of creditors under § 341(a). Under the amended rule, the debtor and trustee must wait until the creditor's opportunity to file a claim has expired. Providing the debtor and the trustee with the opportunity to file a claim ensures that the claim will participate in any distribution in the case. This is particularly important for claims that are nondischargeable.

Since the debtor and trustee cannot file a proof of claim until after the creditor's time to file has expired, the rule no longer permits the creditor to file a proof of claim that will supersede the claim filed by the debtor or trustee. The rule leaves to the courts the issue of whether to permit subsequent amendment of such proof of claim.

Other changes are stylistic.

Public Comment on Proposed Amendments to Rule 3004:

1. Mr. Mark Van Allsburg, clerk of the bankruptcy court for the District of Hawaii, in Comment 03-BK-004, suggested that the rule should be amended to require that the debtor or trustee who files a proof of claim should be required to notify the holder of the claim that a proof its claim has been filed.

Changes Made After Publication and Comment:

No changes were made after publication. The Advisory Committee concluded that Mr. Van Allsburg's suggestion goes beyond the scope of the published proposal. Consequently, the Committee declined to adopt the suggestion but may consider it in greater detail at a future meeting.

Rule 3005. Filing of Claim, Acceptance, or Rejection by Guarantor, Surety, Indorser, or Other Codebtor

(a) FILING OF CLAIM. If a creditor does not timely file ~~has not filed~~ a proof of claim under ~~pursuant to~~ Rule 3002(c) or 3003(c), any entity that is or may be liable with the debtor to that creditor, or who has secured that creditor, ~~may,~~ may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or Rule 3003(c) whichever is applicable~~, execute and file a proof of claim in the name of the creditor, if known, or if unknown, in the entity's own name~~. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution. ~~A proof of claim filed by a creditor pursuant to Rule 3002 or 3003(c) shall supersede the proof of claim filed pursuant to the first sentence of this subdivision.~~

* * * * *

COMMITTEE NOTE

The rule is amended to delete the last sentence of subdivision (a). The sentence is unnecessary because if a creditor has filed a timely claim under Rule 3002 or 3003(c), the codebtor cannot file a proof of such claim. The codebtor, consistent with § 501(b) of the Code, may file a proof of such claim only after the creditor's time to file has expired. Therefore, the rule no longer permits the creditor to file a

superseding claim. The rule leaves to the courts the issue of whether to permit subsequent amendment of the proof of claim.

The amendment conforms the rule to § 501(b) by deleting language providing that the codebtor files proof of the claim in the name of the creditor.

Other amendments are stylistic.

Public Comment on Proposed Amendments to Rule 3005:

1. Hon. Dennis Michael Lynn, United States Bankruptcy Judge for the Northern District of Texas, in Comment 03-BK-005 suggested some stylistic changes to the rule to make it conform more closely to the language of Rule 3004, as amended. The Advisory Committee found that his suggestions improved the rule by making it consistent with the companion rule without changing the meaning of the rule. Thus, those suggestions were adopted.

Changes Made After Publication and Comment:

1. The reference on line 2 of Rule 3005 to "Rule 3002 or 3003(c)" was changed to read "Rule 3002(c) or 3003(c)" to make it parallel to the language in Rule 3004.

2. The phrase "file a proof of the claim" from line 7 of the proposed rule was moved up to line 4 of the proposed amendment immediately after the word "may". This makes the structure of Rules 3004 and 3005 more consistent.

Rule 4008. ~~Discharge and Reaffirmation Hearing~~ Filing of Reaffirmation Agreement

A reaffirmation agreement shall be filed not later than 30 days after the entry of an order granting a discharge or confirming a plan in a chapter 11 reorganization case of an individual debtor. The court, for cause, may extend the time, and leave shall be freely given when justice so requires. ~~Not~~

~~more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as provided in § 524(d) of the Code. A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.~~

COMMITTEE NOTE

The rule is amended to establish a deadline for filing reaffirmation agreements. The Code sets out a number of prerequisites to the enforceability of reaffirmation agreements. Among those requirements are that the agreements be entered into prior to the discharge and that they be filed with the court. Since the parties must make their agreement prior to the entry of the discharge, they will have at least 30 days to file the agreement with the court. Requiring the filing of reaffirmation agreements by a certain deadline also serves to inform the court of the need to hold a hearing under § 524(d) whenever the agreement is not accompanied by an appropriate declaration or affidavit from counsel for the debtor.

The rule allows any party to the agreement to file it with the court. Thus, whichever party has a greater incentive to enforce the agreement usually will file it. In the event that the parties fail to timely file the reaffirmation agreement, the rule grants the court broad discretion to permit a late filing.

The rule also is amended by deleting the provisions formerly in the rule regarding the timing of the reaffirmation and discharge hearing. Instead, the rule leaves discretion to the courts to set the hearing at a time appropriate for the particular circumstances presented in the case and consistent with the scheduling needs of the parties.

Public Comment on Proposed Amendments to Rule 4008:

1. Judge Robert E. Grant, United States Bankruptcy Judge for the Northern District of Indiana, in Comment 03-BK-002 expressed support for the adoption of a deadline for the filing of the agreements, but he took issue with the deadline set in the proposed amendment. Specifically, he expressed concern that the rule allowing the agreements to be filed post-discharge will create problems for the courts that will be called upon to determine whether the agreement was made prior to the entry of the discharge as required by the Code. His proposal was to require that the reaffirmation agreement be filed prior to the entry of the discharge in order to avoid this type of litigation.

2. Mr. Henry J. Sommer, a former member of the Committee, submitted Comment 03-BK-003. Mr. Sommer argued that the discharge date is a better deadline for filing the reaffirmation agreement also because in some jurisdictions the cases are closed very quickly after the entry of the discharge. He suggested that if the Committee proceeds with the thirty day post-discharge deadline, that the Committee should amend Rule 5009 to prohibit the closing of cases until 30 days after the entry of the discharge.

3. Mr. Van Allsburg, the Clerk of the Bankruptcy Court for the District of Hawaii, also urged the Committee not to provide a post-discharge deadline for filing reaffirmation agreements in his Comment 03-BK-004. Mr. Van Allsburg noted that the proposed deadlines will extend the life of cases and prevent the clerk from closing the cases as quickly as is done under the current practice. He stated that the delay in the closing of the case also will postpone creditor collection efforts that § 362 (c)(2)(A) would allow once the case is closed.

Changes Made After Publication and Comment:

No changes were made after publication. The Advisory Committee considered the public comments and concluded that the rule should allow post discharge filing of reaffirmation agreements notwithstanding the issues raised in the public comments. In particular, the Committee recognized the problems that can arise if the reaffirmation agreement is not filed until 30 days after the discharge is entered. Nevertheless, the post-discharge filing of the reaffirmation agreement should not itself require the reopening of the case, so the prior action of closing the case should not be too problematic. The filing of a reaffirmation agreement without a declaration or affidavit by counsel for the debtor will inform the court that a hearing must be scheduled, but again may not require a reopening of the case.

The Advisory Committee considered the timing of the filing and selected thirty days after the discharge for several reasons. Most significantly, the timing of the entry of the discharge is subject to local practice, and in many districts the discharge order is entered quite early in a case. The debtor

and creditor who are parties to the reaffirmation agreement may not know when the order will be entered, and if the agreement is made before that time, it should still be enforceable even if it takes a bit longer to accomplish the filing of the agreement with the court. Moreover, the fairly short time after the entry of the discharge that is allowed for filing the agreement should not delay the proceedings generally, and it should bring whatever applicable issues need to be addressed to the attention of the bankruptcy court in a timely fashion. Nothing in the rule as amended would prevent the clerk from closing the case as expeditiously as under current practice. Finally, any delay in the closing of the case should not postpone collection efforts of creditors because § 362(c)(2)(C) of the Bankruptcy Code would already have operated to dissolve the stay of actions against the debtor.

Rule 7004. Process; Service of Summons, Complaint

(a) SUMMONS; SERVICE; PROOF OF SERVICE.

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (*l*), and (m) F.R.Civ.P. applies in adversary proceedings. Personal service under ~~pursuant to~~ Rule 4(e)-(j) F.R.Civ.P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(2) The clerk may sign, seal, and issue a summons electronically by putting an "s/" before the clerk's name and including the court's seal on the summons.

* * * * *

COMMITTEE NOTE

This amendment specifically authorizes the clerk to issue a summons electronically. In some bankruptcy cases the trustee or debtor in possession may commence hundreds of adversary proceedings simultaneously, and permitting the electronic signing and

sealing of the summonses for those proceedings increases the efficiency of the clerk's office without any negative impact on any party. The rule only authorizes electronic issuance of the summons. It does not address the service requirements for the summons. Those requirements are set out elsewhere in Rule 7004, and nothing in Rule 7004(a)(2) should be construed as authorizing electronic service of a summons.

Public Comment on Proposed Amendments to Rule 7004:

No comments were received on these proposed amendments.

Changes Made After Publication and Comment:

No changes were made after publication.

Rule 9006. Time

* * * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5 (b)(2)(C) or (D) F.R.CIV.P. When there is a right or requirement to ~~do some~~ act or undertake some proceedings within a prescribed period after service ~~of a notice or other paper and the notice or paper other than process is served~~ and that service is by mail or under Rule 5 (b)(2)(C) or (D) F. R. Civ. P., three days ~~shall be~~ are added ~~to~~ after the prescribed period would otherwise expire under Rule 9006(a).

* * * * *

COMMITTEE NOTE

Rule 9006(f) is amended, consistent with a corresponding amendment to Rule 6 (e) of the F.R. Civ. P, to clarify the method of counting the number of days to respond after service either by mail or under Civil Rule 5(b)(2)(C) or (D). Three days are added after the prescribed period expires. If, before the application of Rule 9006(f), the prescribed period is less than 8 days, intervening Saturdays, Sundays, and legal holidays are excluded from the calculation under Rule 9006(a). Some illustrations may be helpful.

Under existing Rule 9006(a), assuming that there are no legal holidays and that a response is due in seven days, if a paper is filed on a Monday, the seven day response period commences on Tuesday and concludes on Wednesday of the next week. Adding three days to the end of the period would extend it to Saturday, but because the response period ends on a weekend, the response day would be the following Monday, two weeks after the filing of the initial paper. If the paper is filed on a Tuesday, the seven-day response period would end on the following Thursday, and the response time would also be the following Monday. If the paper is mailed on a Wednesday, the initial seven-day period would expire nine days later on a Friday, but the response would again be due on the following Monday because of Rule 9006(f). If the paper is mailed on a Thursday, however, the seven day period ends on Monday, eleven days after the mailing of the service because of the exclusion of the two intervening Saturdays and Sundays. The response is due three days later on the following Thursday. If the paper is mailed on a Friday, the seven day period would conclude on a Tuesday, and the response is due three days later on a Friday.

No other change in the system of counting time is intended.

Other changes are stylistic.

Public Comment on Proposed Amendments to Rule 9006:

1. Hon. Dennis Michael Lynn (B.J, N.D. Tex.) in Comment 03-BK-005 suggested that Rule 9006(b) be amended to limit an extension of time to file a proof of claim to grounds set out in Rules 3004 and 3005. Upon review, the Advisory Committee concluded that this proposal

is beyond the scope of the proposed amendment to the rule and the Committee will consider the issue at a subsequent meeting.

2. Mr. Alex Manners, Director of Product Development of Compulaw LLC, in Comment 03-BK-007 urged a change in the proposed amendments to Civil Rule 6(e) and Bankruptcy Rule 9006(f). He asserted that the amendment should refer to "calendar" days as the days that are added to the end of the prescribed response periods.

3. The Advisory Committee also received copies of comments on the proposed amendments to Civil Rule 6(e). These comments generally expressed support for the amendment and frequently included the suggestion that the rule refer to "calendar" days in much the same manner as Mr. Manners' suggestion set out immediately above.

Changes Made After Publication and Comment:

The phrase "would otherwise expire under Rule 9006(a)" was added to the end of the rule to clarify further that the three day extension is to be added to the end of the period that is established under the counting provisions of Rule 9006(a). This also maintains a parallel construction with Civil Rule 6(e) in which the same addition to the rule was made after the public comment period.

4. Proposed Amendments to Schedules G of Official Form 6, and Official Forms 16D and 17.

The Advisory Committee recommends that the Standing Committee approve the amendments to Official Forms 16D and 17, and that this approval be made effective as of December 1, 2004. The Advisory Committee also recommends that the Standing Committee approve the amendment to Official Form 6-G, and that this amendment be made effective as of December 1, 2005. The approval of Official Form 6-G is conditional on the approval of the amendments to Bankruptcy Rule 1007 set out above.

The amended Official Forms are attached to the end of this report.

Schedule G of Official Form 6 is a listing of all of the executory contracts and unexpired leases to which the debtor is a party. The Schedule formerly included a note that reminded the person completing the form that listing an entity on Schedule G would not ensure that the listed party would receive a notice of the filing of the case. The proposed amendment to Rule 1007 would make this directive inaccurate and unnecessary. Under the proposed rule, entities listed on Schedule G will receive the notice. Thus, the proposed amendment to Schedule G deletes the note. Since it implements the amendment to Rule 1007 that was published for comment, the Advisory Committee

believes there is no need to publish for comment the amendment to Schedule G. It should be made effective as of December 1, 2005, along with the amendment to Rule 1007.

The abrogation of Official Form 16C in December 2003 created the need for the conforming amendments to Official Forms 16D and 17. The amendments are brief and the Advisory Committee believes that there is no need to publish the amendments for comment. These changes should be made effective as of December 1, 2004, to provide publishers with an opportunity to have the new forms available on their effective date.

7B

B. Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1009, 2002, 4002, 7004, and 9001, and Schedule I of Official Form 6.

The Advisory Committee recommends that the Standing Committee approve the following preliminary draft of proposed amendments to the Bankruptcy Rules and Official Forms for publication for comment.

1. Synopsis of Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1009, 2002, 4002, 7004, and 9001, and Schedule I of Official Form 6.

(a) Rule 1009 is amended to include a provision requiring the debtor to submit a corrected statement of social security number when the debtor becomes aware of an error in a statement of social security number previously submitted to the court.

(b) Rule 2002(g) is amended by adding a new subdivision (g)(4) that authorizes entities and notice providers to agree on the manner and address to which service may be effected. The amendment is intended to facilitate notices to creditors that operate on a national basis, although the rule allows such agreements by any entity with any notice provider. A related amendment to Rule 9001 defines notice providers.

(c) Rule 4002 is amended by adding a new subdivision (b) to implement the directives of § 521 of the Bankruptcy Code. The amendment requires that a debtor bring certain documentation to the § 341 meeting of creditors to establish current income and ownership of financial accounts, as well as the debtor's most recently filed federal income tax return.

(d) Rule 7004 is amended to revise the method of service of a summons and complaint on the attorney for the debtor whenever an entity serves the debtor with a summons and complaint. The amendment makes clear that the debtor's attorney must be served with a copy of any summons and complaint against the debtor without regard to the manner in which the summons and complaint was served on the debtor. Under the current rule, the debtor's attorney must be served only if the summons and complaint was served on the debtor by mail.

(e) Rule 9001 is amended to add a definition of notice provider to the rule. The definition is to be read in conjunction with the proposed amendment to Rule 2002(g).

(f) Schedule I of Official Form 6 is amended to require the disclosure of the current income of the non-filing spouse of a debtor.

2. Text of Preliminary Draft of Proposed Amendments to Rules 1009, 2002, 4002, 7004, and 9001, and Schedule I of Official Form 6.

Rule 1009. Amendments of Voluntary Petitions, Lists, Schedules and Statements

* * * * *

(c) STATEMENT OF SOCIAL SECURITY NUMBER. If a debtor becomes aware that the statement of social security number submitted under Rule 1007(f) is incorrect, the debtor shall promptly submit a verified amended statement setting forth the correct social security number. The debtor shall give notice of the amendment to all the entities required to be included on the list filed under Rule 1007(a)(1) or (a)(2).

~~(c)~~(d) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall ~~forthwith~~ promptly transmit to the United States trustee a copy of every amendment filed or submitted under ~~pursuant to~~ subdivision (a), (b), or (c) ~~or (b)~~ of this rule.

COMMITTEE NOTE

Rule 2002(a)(1) requires that the notice of the § 341 meeting of creditors include the debtor's social security number. It provides creditors with the full number while limiting publication of the social security number otherwise to the final four digits of the number to protect the debtor's identity from others who do not have the same need for that information. If, however, the social security number that the debtor submitted under Rule 1007(f) is incorrect, then the

only notice to the entities contained on the list filed under Rule 1007(a)(1) or (a)(2) would be incorrect. This amendment adds a new subdivision (c) that directs the debtor to submit a verified amended statement of social security number and to give notice of the new statement to all entities in the case who received the notice containing the erroneous social security number.

Former subdivision (c) becomes subdivision (d) and is amended to include new subdivision (c) amendments in the list of documents that the clerk must transmit to the United States trustee. Other amendments are stylistic.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee[**]**

* * * * *

(g) ADDRESSING NOTICES.

(1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision –

(A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice

---

** The amendment to Rule 9001 should be considered in tandem with the proposed amendment to Rule 2002. Rule 9001 as proposed to be amended is set out at the end of this section of the report.

of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest filed by an equity security holder that designates a mailing address constitutes a filed request to mail notices to that address.

(2) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of equity security holders.

(3) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or incompetent person, and a person other than that representative files a request or proof of claim designating a name and mailing address that differs from the name and address of the representative included in the list or schedule, unless the court orders otherwise, notices under Rule 2002 shall be mailed to the representative included in the list or

schedules and to the name and address designated in the request or proof of claim.

(4) Notwithstanding Rule 2002(g) (1) - (3), an entity and a notice provider may agree that when the notice provider is directed by the court to give a notice, the notice provider shall give the notice to the entity in the manner agreed to and at the address or addresses the entity supplies to the notice provider. That address is conclusively presumed to be a proper address for the notice. The notice provider's failure to use the supplied address does not invalidate any notice that is otherwise effective under applicable law.

* * * * *

COMMITTEE NOTE

A new paragraph (g)(4) is inserted in the rule. The new paragraph authorizes an entity and a notice provider to agree that the notice provider will give notices to the entity at the address or addresses set out in their agreement. Rule 9001(9) sets out the definition of a notice provider.

The business of many entities is national in scope, and technology currently exists to direct the transmission of notice (both electronically and in paper form) to those entities in an accurate and much more efficient manner than by sending individual notices to the same creditor by separate mailings. The rule authorizes an entity and a notice provider to determine the manner of the service as well as to set the address or addresses to which the notices must be sent. For example, they could agree that all notices sent by the notice provider to the entity must be sent to a single, nationwide electronic or postal address. They could also establish local or regional addresses to

which notices would be sent in matters pending in specific districts. Since the entity and notice provider also can agree on the date of the commencement of service under the agreement, there is no need to set a date in the rule after which notices would have to be sent to the address or addresses that the entity establishes. Furthermore, since the entity supplies the address to the notice provider, use of that address is conclusively presumed to be proper. Nonetheless, if that address is not used, the notice still may be effective if the notice is otherwise effective under applicable law. This is the same treatment given under Rule 5003(e) to notices sent to governmental units at addresses other than those set out in that register of addresses.

The remaining subdivisions of Rule 2002(g) continue to govern the addressing of a notice that is not sent pursuant to an agreement described in Rule 2002(g)(4).

Rule 4002. Duties of Debtor

(a) GENERAL DUTIES. In addition to performing other duties prescribed by the Code and rules, the debtor shall:

(1) attend and submit to an examination at the times ordered by the court;

(2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness;

(3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order if a schedule of property has not yet been filed pursuant to Rule 1007;

(4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate; and

(5) file a statement of any change of the debtor's address.

(b) INDIVIDUAL DEBTOR'S DUTY TO PROVIDE DOCUMENTATION.

(1) *Personal Identification.* Every individual debtor shall bring to the meeting of creditors under § 341 a picture identification issued by a governmental unit and evidence of social security number(s), or provide a written statement that such documentation does not exist or is not in the debtor's possession;

(2) *Financial Information.* Unless the trustee, the United States trustee, or the bankruptcy administrator instructs otherwise, every individual debtor shall bring to the meeting of creditors under § 341 and make available to the trustee the following documents or copies of them, or provide a written statement that the documentation does not exist or is not in the debtor's possession:

(A) evidence of current income, such as the most recent pay stub;

(B) the debtor's most recently filed federal income tax return, including any attachments; and

(C) statements for each of the debtor's depository and investment accounts, including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the date of the filing of the petition.

COMMITTEE NOTE

The rule is amended to implement the directives of § 521 (3) and (4) of the Code that the debtor cooperate with the trustee to permit the trustee to perform the trustee's duties and to provide the trustee with materials and documents as necessary to the administration of the estate or to determine if the debtor is entitled to a discharge. Nothing in the rule, however, is intended to limit or restrict the debtor's duties under § 521. The rule does not require that the debtor create documents or obtain documents from third parties; rather, the debtor's obligation is to bring to the meeting of creditors under § 341 the documents which the debtor possesses. Any written statement that the debtor provides indicating either that documents do not exist or are not in the debtor's possession must be verified or contain an unsworn declaration as required under Rule 1008.

Because the amendment implements the debtor's duty to cooperate with the trustee, the materials would not be made available to any other party in interest at the § 341 meeting of creditors. Some of the documents may contain otherwise private information that should not be disseminated. For example, the debtor's tax return may include social security numbers of the debtor and the debtor's spouse and dependents, as well as the names of the debtor's children. This type of information would not usually be needed by creditors and others who may be attending the meeting. If a creditor perceives a need to review specific documents or other evidence, the creditor may proceed under Rule 2004.

Rule 7004. Process; Service of Summons, Complaint

* * * * *

(b) SERVICE BY FIRST CLASS MAIL.

* * * * *

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition ~~or statement of affairs~~ or to such other address as the debtor may designate in a filed writing ~~and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address~~.

* * * * *

(g) SERVICE ON DEBTOR'S ATTORNEY. If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F. R. Civ. P.

* * * * *

COMMITTEE NOTE

Under current Rule 7004, an entity may serve a summons and complaint upon the debtor by personal service or by mail. If the entity chooses to serve the debtor by mail, it must also serve a copy of the summons and complaint on the debtor's attorney by mail. If

the entity effects personal service on the debtor, there is no requirement that the debtor's attorney also be served.

The rule is amended to require service on the debtor's attorney whenever the debtor is served with a summons and complaint. The amendment makes this change by deleting that portion of Rule 7004(b)(9) that requires service on the debtor's attorney when the debtor is served by mail, and relocates the obligation to serve the debtor's attorney into new subdivision (g). Service on the debtor's attorney is not limited to mail service, but may be accomplished by any means permitted under Rule 5(b) F. R. Civ. P.

Rule 9001. General Definitions

* * * * *

(9) "Notice provider" means any entity approved by the Administrative Office of the United States Courts to give notice to creditors under Rule 2002(g)(4).

(10) ~~(9)~~ "Regular associate" means any attorney regularly employed by, associated with, or counsel to an individual or firm.

(11) ~~(10)~~ "Trustee" includes a debtor in possession in a chapter 11 case.

(12) ~~(11)~~ "United States trustee" includes an assistant United States trustee and any designee of the United States trustee.

COMMITTEE NOTE

The rule is amended to add the definition of a notice provider and to renumber the final three definitions in the rule. A notice provider is an entity approved by the Administrative Office of the United States Courts to enter into agreements with entities to give notice to those entities in the form and manner agreed to by those parties. The new definition supports the amendment to Rule 2002(g)(4) that authorizes a notice provider to give notices under Rule 2002.

Many entities conduct business on a national scale and receive vast numbers of notices in bankruptcy cases throughout the country. Those entities can agree with a notice provider to receive their notices in a form and at an address or addresses that the creditor and notice provider agree upon. There are processes currently in use that provide substantial assurance that notices are not misdirected. Any notice provider would have to demonstrate to the Administrative Office of the United States Courts that it could provide the service in a manner that ensures the proper delivery of notice to creditors. Once the Administrative Office of the United States Courts approves the notice provider to enter into agreements with creditors, the notice provider and other entities can establish the relationship that will govern the delivery of notices in cases as provided in Rule 2002(g)(4).

Schedule I of Official Form 6 is attached to the end of this Report.

III. Information Items

(1) *Proposed Bankruptcy Legislation*

Congress continues to consider extensive reform of the Bankruptcy Code, but recent reports suggest that movement on the pending legislation is not likely. Nevertheless, the Advisory Committee remains ready to make recommendations to the Standing Committee to implement the provisions of the bill if the legislation is enacted.

The Advisory Committee also has begun to work with the Committee on Bankruptcy Administration to address issues such as the venue of cases, and the issuance of first day orders and debtor in possession financing orders, particularly in large chapter 11 cases. A special committee has been formed and will be meeting later this summer to commence a study of these issues with a goal of presenting proposed amendments to the Bankruptcy Rules.

The Advisory Committee also is considering amendments to the proof of claim form, Official Form 10, based on suggestions provided to the Committee by the Claims Processing subgroup of the CM/ECF Working Group. These efforts are ongoing, and it is likely that the Advisory Committee will be presenting proposed amendments to that Official Form to the Standing Committee either in January or June 2005.

(2) *Draft Minutes*

Draft minutes of the March 2004 meeting of the Advisory Committee are attached.

ATTACHMENTS:

Schedule G of Official Form 6
Official Forms 16D and 17
Schedule I of Official Form 6
Draft Minutes of March 2004 Advisory Committee Meeting

Official Form B6G
(12/05)
(Draft)

In re _____, Debtor

Case No._____ (if known)

SCHEDULE G - EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Describe all executory contracts of any nature and all unexpired leases of real or personal property. Include any timeshare interests. State nature of debtor's interest in contract, i.e., "Purchaser," "Agent," etc. State whether debtor is the lessor or lessee of a lease. Provide the names and complete mailing addresses of all other parties to each lease or contract described.

~~NOTE: A party listed on this schedule will not receive notice of the filing of this case unless the party is also scheduled in the appropriate schedule of creditors.~~

☐ Check this box if debtor has no executory contracts or unexpired leases.

NAME AND MAILING ADDRESS, INCLUDING ZIP CODE, OF OTHER PARTIES TO LEASE OR CONTRACT.	DESCRIPTION OF CONTRACT OR LEASE AND NATURE OF DEBTOR'S INTEREST. STATE WHETHER LEASE IS FOR NONRESIDENTIAL REAL PROPERTY. STATE CONTRACT NUMBER OF ANY GOVERNMENT CONTRACT.

Form 6G

COMMITTEE NOTE

The form is amended to implement an amendment to Rule 1007 by deleting the instruction that parties to these contracts and leases will not receive notice of the bankruptcy case unless they are listed on one of the schedules of liabilities. Even though a contract or lease may be an asset of the debtor or the debtor may be current on any lease or contract payment obligations, other parties to these transactions may have an interest in the bankruptcy case and should receive notice.

Official Form 16D
(12/04)
(Draft)

Form 16D. CAPTION FOR USE IN ADVERSARY PROCEEDING ~~OTHER THAN FOR A COMPLAINT FILED BY A DEBTOR~~

United States Bankruptcy Court

_____ District Of _____

In re _____, *Debtor*	)	Case No. _____
	)	Chapter _____
_____, *Plaintiff*	)	
_____, *Defendant*	)	Adv. Proc. No. _____

COMPLAINT [*or* other Designation]

[If in a Notice of Appeal (see Form 17) or other notice filed and served by a debtor, this caption must be altered to include the debtor's address and Employer's Tax Identification Number(s) or last four digits of Social Security Number(s) as in Form 16~~C~~A.]

Form 16D

COMMITTEE NOTE

The form is amended to reflect the 2003 abrogation of Form 16C. As a complaint initiating an adversary proceeding serves as a notice to the defendant of the filing of an action, a debtor filing an adversary proceeding must follow the notice requirements of § 342(c) of the Code. To protect individual privacy a debtor should use the defendant's copy of the summons to be served with the complaint to provide the information required by § 342(c) to any creditor named as a defendant.

Official Form 17
(12/04)
(Draft)

United States Bankruptcy Court

_____ District Of _____

In re _____,
Debtor

Case No. _____

Chapter _____

[Caption as in Form 16A, 16B, ~~16C,~~ or 16D, as appropriate]

NOTICE OF APPEAL

_____, the plaintiff [*or* defendant *or* other party] appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy judge (describe) entered in this adversary proceeding [*or other proceeding, describe type*] on the _____ day of _____, _____.
(month) (year)

The names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:

Dated: _____

Signed: _____
Attorney for Appellant (or Appellant, if not represented by an Attorney)

Attorney Name: _____

Address: _____

_____

Telephone No: _____

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal. Any other party may elect, within the time provided in 28 U.S.C. § 158(c), to have the appeal heard by the district court.

If a child support creditor or its representative is the appellant, and if the child support creditor or its representative files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

Form 17

COMMITTEE NOTE

The form is amended to reflect the 2003 abrogation of Form 16C.

Official Form B6I
12/05
(Draft)

In re _____, **Case No.** _____
Debtor **(if known)**

SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

The column labeled "Spouse" must be completed in all cases filed by joint debtors and by a married debtor in a chapter 7, 12 or 13 case whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.

Debtor's Marital Status:	DEPENDENTS OF DEBTOR AND SPOUSE	
	RELATIONSHIP	AGE

Employment:	DEBTOR	SPOUSE
Occupation		
Name of Employer		
How long employed		
Address of Employer		

Income: (Estimate of average monthly income)	DEBTOR	SPOUSE
Current monthly gross wages, salary, and commissions (pro rate if not paid monthly.)	$ _____	$ _____
Estimated monthly overtime	$ _____	$ _____
SUBTOTAL	$ _____	$ _____
LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and social security	$ _____	$ _____
b. Insurance	$ _____	$ _____
c. Union dues	$ _____	$ _____
d. Other (Specify: _____)	$ _____	$ _____
SUBTOTAL OF PAYROLL DEDUCTIONS	$ _____	$ _____
TOTAL NET MONTHLY TAKE HOME PAY	$ _____	$ _____
Regular income from operation of business or profession or farm (attach detailed statement)	$ _____	$ _____
Income from real property	$ _____	$ _____
Interest and dividends	$ _____	$ _____
Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above.	$ _____	$ _____
Social security or other government assistance (Specify) _____	$ _____	$ _____
Pension or retirement income	$ _____	$ _____
Other monthly income	$ _____	$ _____
(Specify) _____	$ _____	$ _____
_____	$ _____	$ _____
TOTAL MONTHLY INCOME	$ _____	$ _____

TOTAL COMBINED MONTHLY INCOME $_____ (Report also on Summary of Schedules)

Describe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document:

2005 COMMITTEE NOTE

Schedule I (Current Income of Individual Debtor(s)) is amended to require a married debtor filing under chapter 7 of the Code to complete the column labeled "Spouse" whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. This information may be relevant to § 707(b) of the Code or other financial determinations. The relevance of this information to § 707(b) or other determinations is a matter of substantive law and is beyond the scope of these rules.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 25-26, 2004
Amelia Island, Florida

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
Circuit Judge R. Guy Cole, Jr.
District Judge Ernest C. Torres
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
District Judge Irene M. Keeley
District Judge Richard A. Schell
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, and Ms. Patricia S. Ketchum, advisor to the Committee, attended the meeting.

Circuit Judge Marjorie O. Rendell, chair of the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee); Bankruptcy Judge Dennis Montali, liaison from the Bankruptcy Administration Committee; Peter G. McCabe, secretary of the Committee on Rules of Practice and Procedure (Standing Committee); Lawrence A. Friedman, Director, Executive Office for United States Trustees (EOUST); Martha L. Davis, Principal Deputy Director, EOUST; Circuit Judge Harris L. Hartz, liaison from the Standing Committee; and Professor Daniel R. Coquillette, reporter of the Standing Committee, attended. District Judge David S. Levi, chair of the Standing Committee, was unable to attend.

The following additional persons attended the meeting: James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Administrative Office); James Ishida, Rules Committee Support Office; James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center

(FJC).

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold**.

Introductory Matters

The Chairman welcomed all the members, liaisons, advisers, and guests to the meeting. The Chairman recognized Judge Cole and Judge Schell, the new members of the Committee; Judge Hartz, the new liaison from the Standing Committee; and Judge Rendell, the new chair of the Bankruptcy Administration Committee.

The Committee approved the minutes of the September 2003 meeting.

The Chairman briefed the Committee on the January 2004 meeting of the Standing Committee. The Standing Committee approved the Committee's recommendation to publish proposed amendments to Rules 5005(c) and 9036 for public comment. The proposed amendments will be published in August. The Standing Committee also approved the publication of style revisions of Civil Rules 16 - 37 and 45. At its meeting in June 2003, the Standing Committee approved for publication style revisions of Civil Rules 1 - 15. Mr. Rabiej stated that the Standing Committee has decided to publish all of the restyled Civil Rules for comment at the same time.

Judge Rendell and Judge Montali reported on the January 2004 meeting of the Bankruptcy Administration Committee. Judge Rendell discussed several recent initiatives by the Bankruptcy Administration Committee, including the law clerk assistance program, which utilizes the JNET to post information on where assistance is needed; the email judges' newsletter Core Proceedings; and bankruptcy judges' efforts to educate the public about debt. Judge Montali stated that the Judicial Conference had approved the Bankruptcy Administration Committee's recommendation that section 104(a) of the Bankruptcy Code be repealed and that a bankruptcy judge be invited to attend Judicial Conference sessions in a non-voting capacity. Judge Montali stated that the Bankruptcy Administration Committee will conduct a study this year of the continuing need for existing bankruptcy judgeships and will study the need for additional judgeships next year. He said the Bankruptcy Administration Committee is preparing to conduct a study of case weights, which should be completed by 2006.

Action Items

Venue and Large Chapter 11 Cases. Judge Montali said that the FJC's conference on

large chapter 11 cases had resulted in a number of proposals by the Bankruptcy Administration Committee's Subcommittee on Venue-Related Matters, including a request that this Committee consider several areas of bankruptcy practice which might benefit from the adoption of new or revised rules. These include first day orders for matters such as critical vendors and payment of prepetition wages and benefits; financing orders; omnibus objections to claims; use of the Official Bankruptcy Forms; and, if 28 U.S.C. § 1412 is not amended, venue. One committee member said the rules should slow down consideration of first day and retention of counsel orders because the debtor and a few creditors have negotiated many of the issues before the case is filed. As a result, the member said, creditors don't have time to analyze the issues and the creditors' committee often starts the case at a disadvantage.

In response to the recommendation by the Bankruptcy Administration Committee, the Chairman stated that an ad hoc committee will be formed to address the venue issues and other chapter 11 concerns raised in the report of the chapter 11 conference and in Judge Montali's letter of March 11. Mr. Shaffer will chair the ad hoc committee, which will include Judge Cole, Judge Klein, and Mr. Adleman as representatives of this Committee. The ad hoc committee may have recommendations for consideration at the September meeting.

Comments on Preliminary Draft Amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006. The Chairman stated that the public hearing tentatively scheduled for January 30, 2004, was cancelled because no one asked to testify. He said there were no specific comments on the proposed amendments to Rules 1007 and 7004. **A motion to recommend that the Standing Committee give its final approval to the proposed amendments to Rules 1007 and 7004 as published carried without dissent.**

Mark Van Allsburg, the clerk of the bankruptcy court in Hawaii, suggested that Rule 3004 should not continue the current requirement that the clerk mail notice to the creditor, the debtor, and the trustee when the trustee or the debtor files a claim on behalf of the creditor. The Committee discussed whether it is better to require the filer to notice the claim (and file a certificate of service) or for the clerk to give the notice. Mr. Waldron said it is difficult for the clerk's office to identify claims filed by the trustee or the debtor. **The Chairman stated that Mr. Van Allsburg's comment is beyond the scope of the proposed amendment as published, but could be considered at the September meeting if any Committee member desires to do so.** Judge Dennis Michael Lynn commented that the proposed amendment to Rule 3005 is not consistent with the wording of the proposed amendment to Rule 3004. The Reporter stated that the amendments kept the structure of the original rules. The Chairman stated that the Style Subcommittee could make the two rules parallel without making a substantive change. **A motion to recommend final approval of the proposed amendments to Rules 3004 and 3005 as published, subject to review by the Style Subcommittee, carried without dissent.**

The Chairman stated that the idea of setting a deadline for filing reaffirmation agreements has proved to be popular but not the specific deadline included in the proposed

amendment to Rule 4008 – 30 days after the entry of the discharge. Three written comments suggested that the agreements be filed by the date of the discharge. The Chairman said others have suggested that reaffirmation agreements be filed within a short time (such as 10 days) after the discharge. He said the parties generally receive notice of the discharge within five days. The Committee discussed whether the court would have to keep cases open until the deadline for filing reaffirmation agreements has passed and the impact that would have on the court's case processing statistics. One Committee member stated that courts which want to close cases quickly could do so. Another member said 10 days seems a bit short since creditors and debtors might not be sure when the discharge will be issued. **Judge Walker's motion to recommend final approval of the proposed amendment to Rule 4008 as published carried without dissent.**

The Chairman stated that several comments had been received on the proposed amendments to Rule 9006 and the comparable amendment to Civil Rule 6, which were intended to clarify the method of counting the number of days to respond after certain kinds of service. He said the Advisory Committee on Civil Rules (the Civil Rules Committee) is unlikely to revise the published version of its proposed amendment at its April meeting except possibly to add the word "calendar" to the amendment or to add more examples in the Committee Note. The Reporter noted that the Committee Note to the proposed amendment to the Bankruptcy Rule already includes several examples and that adding the word "calendar" to proposed amendment would not change the examples. **A motion to recommend final approval of the proposed amendment to Rule 9006 as published, subject to reconsideration if the Civil Rules Committee revises the proposed amendment to Civil Rule 6, carried without dissent.** Several speakers said there is no reason the Bankruptcy Rule should be different from the Civil Rule on counting. **A motion to authorize Judge Walker, the liaison to the Civil Rules Committee, to recommend that the Civil Rules Committee add the word "calendar" and to inform the Civil Rules Committee that this Committee will follow suit if it does so carried without dissent.** The Chairman stated that a revised amendment to Rule 9006 could be considered immediately by email ballot, if needed, to track revised language in the Civil Rule.

Rule 2002(g) — National Creditor Registry. The Bankruptcy Noticing Working Group had previously requested that the Committee consider amending Rule 2002(g) to permit creditors to receive notices on a national or regional basis. Section 315 of the Bankruptcy Reform Act of 2003, H.R. 975, as passed by the House of Representatives, includes a similar provision. At the September meeting, the committee approved the proposal in principle and the Chairman asked the Reporter to prepare alternative drafts of the proposed amendment. One draft would allow a creditor to notify a clerk's office of its preferred address and the other would allow a creditor and an approved Notice Provider (as defined in Rule 9001) to make their own arrangements. The proposal was referred to the Technology Subcommittee, which is chaired by Judge Zilly.

While the matter was under review, the Director of the Administrative Office announced the National Creditor Registration Service for electronic noticing through the Bankruptcy Noticing Center (BNC). Judge Zilly said the new, enhanced service does essentially the same

thing for electronic notices as the proposed amendment; it allows the creditor and the BNC to agree where the notice will be sent. After a lengthy discussion, the Subcommittee was split as to whether a rules amendment is currently necessary but strongly recommended that, if an amendment is adopted, creditors be permitted to make arrangements directly with approved notice providers. In consultation with the contractor which operates the BNC, the Administrative Office estimated that the proposed amendment could result in an annual postage savings of approximately $1.9 million by increasing batched mail transmitted to preferred mailing addresses identified by creditors.

The Reporter stated that, contrary to his earlier assumption, some national creditors do not want electronic notices. Some either prefer paper notices or would have difficulty using electronic notices. In addition, he said, the Committee could monitor the performance of the new National Creditor Registration Service and the acceptance of a national creditor registry while the proposed amendment is pending. Mr. Shaffer said he is inclined to go forward with an amendment despite his earlier misgivings about the proposal. He said he had been concerned because of the pendency of the legislation, the possibility of mistakes in the registry system, the application of the registry to notices given by debtors and trustees, and the possibility that software changes would make the rule outdated. Judge McFeeley stated that a trustee would be covered if the trustee was approved as a notice provider. The Committee discussed how the creditor registry would treat the entry of appearance and request for service filed by the attorney for a creditor. One member stated that the attorney and the creditor would both get notices because the attorney's name and address would not match the creditor's in the registry.

Judge Torres suggested changing "the proper address" to "a proper address" in line 9. Committee members suggested making the new provision paragraph (g)(4), instead of paragraph (g)(1); substituting the phrase "paragraphs 1 - 3" for the phrase "subparts (2) - (3);" and striking the phrase "for purposes of this subdivision." Mr. Frank suggested that the proposal be extended to chapter 11 cases. Mr. Adelman said chapter 11 claims agents who qualify as Notice Providers should have the option of using the national creditor registry. Judge McFeeley said his court uses the BNC to provide notices in chapter 11 cases. **A motion to approve the proposed amendments to Rules 2002(g) and 9001 for publication with the suggested revisions carried without dissent. The Chairman asked Mr. Wannamaker to check whether including chapter 11 cases would cause problems for the Administrative Office.**

Rule 9014 — Electronic Service. Mr. Waldron had stated at the September meeting that several electronic filers in his court have complained that Rule 9014 requires them to serve the motion initiating a contested matter in the manner provided for the service of a summons and complaint in Rule 7004 even if the contested matter is initiated electronically. Mr. Waldron provided the Technology Subcommittee with informally collected data which demonstrated that many practitioners failed to follow the existing requirements of Rule 9014. The Subcommittee concluded that electronic service of the initial motion should suffice as to counsel to a party in the proceeding if the attorney is a participant in the CM/ECF program. CM/ECF participants agree to accept electronic service.

The Subcommittee offered two draft amendments. The first draft would authorize electronic service on any entity that is participating in the CM/ECF program, as well as the debtor's attorney. The debtor would be entitled to be served with a paper copy. The other draft would require paper service on the debtor and any other party to the contested matter, but would permit attorneys to be served electronically if they are CM/ECF participants The Committee discussed the distinction between service on a creditor and service on the creditor's attorney, who may have entered the case on an unrelated matter. One member said the nature of the attorney's representation in the case is important. Another member stated that an attorney's entrance of appearance in the case is an implicit or explicit agreement to accept service in all matters.

Professor Resnick asked why the rule should be changed for service on an attorney if service must be made on a party, but not the party's attorney. He suggested amending Rule 7004(b)(9) instead of Rule 9014. The Chairman stated that an amendment to Rule 7004(b)(9) would apply to both adversary proceedings and contested matters. Professor Resnick said Rule 7004(b)(9) is intended to protect the debtor by requiring service on both the debtor and the debtor's attorney. One member said the debtor's attorney may have authority to accept service for the debtor. The Chairman asked whether service on an attorney who has entered an appearance in the case should be recognized as service on the attorney's client. One member agreed. Another Committee member asked why contested matters within the bankruptcy case are treated as separate litigation when counterclaims and cross-claims in a civil action can be served on an attorney. Professor Resnick said the counterclaims and cross-claims in a civil action all relate to the original complaint whereas the contested matters may be unrelated.

The Committee agreed to amend Rule 7004(b)(9) to permit service on the debtor's attorney in the manner provided in Civil Rule 5(b)(2)(D). The Committee discussed deleting the phrase "or statement of affairs" from Rule 7004(b)(9) because the debtor's residence is no longer listed in the Statement of Financial Affairs. Judge Swain stated that service on the debtor's attorney is required by Rule 7004(b), which provides for service by first class mail on a permissive basis. Thus, she stated, if personal service is made on the debtor under Rule 7004(a), there is no requirement to serve the debtor's attorney. **After a brief discussion, the Committee agreed to delete the phrase "or statement of affairs," to delete the remainder of Rule 7004(b)(9) after the phrase "in a filed writing," and to provide in a new Rule 7004(g) for service on the debtor's attorney in the manner provided in Rule 7005. The Chairman asked the Reporter to circulate a draft of the proposed amendment for approval after the meeting.**

Rule 4002 — Debtor's Production of Documents. The Director of the EOUST had submitted a proposal for amendments to Rules 2003, 4002, 2016, and 7001 as well as an amendment to Schedule I of Official Form 6 and the issuance of a new Official Form to implement some of the changes in Rule 2016. The Committee discussed the proposals at its meeting in September 2003, approved the proposed amendment to Schedule I, and sent the remainder of the proposal to the Subcommittee on Consumer Issues for further consideration.

The Subcommittee invited written comments from interested individuals and groups and conducted a focus group meeting in Washington, D.C. Representatives of the EOUST, trustees, and debtors' attorneys presented their views at the focus group meeting. Although the vast majority of the written comments received by the Subcommittee were opposed to requiring the debtor to produce a specific list of materials as unnecessarily burdensome, the proposal did have some supporters. The chapter 7 and chapter 13 trustees who spoke at the focus group meeting indicated that requiring the debtor to bring additional materials to the meeting of creditors would enhance their ability to perform their duties and favored the proposal with some reservations. The representative of the National Association of Consumer Bankruptcy Attorneys argued that the cost of compiling and delivering many of the documents would be prohibitive for some debtors; that the information would actually be used by the trustee in only 20 - 30 percent of their cases, either because the dollar amounts are too low or because the trustee believes further investigation is not necessary; that handling and keeping the materials would be burdensome for trustees; and that the EOUST proposal failed to address privacy concerns raised by producing documents such as tax returns.

After considering the written comments and presentations, the Subcommittee found that it would be appropriate to expand the existing list of the debtor's duties in Rule 4002 but that there is no need to insert new duties in Rule 2003. The Subcommittee concluded that the rule should require the debtor to present appropriate personal identification at the meeting of creditors and provide certain financial documents to the trustee on request, rather than mandating that the debtor produce specific documents in every case. Mr. Frank, the chair of the Subcommittee, said the group found that document production should be done on a case-by-case basis, that — even without a rule — trustees generally get the information they need from debtors, and that any new rule should be as flexible as possible. He said most trustees have the experience which allows them to identify the small percentage of cases in which they need additional items.

Mr. Friedman stated that his effort to get more accurate information from debtors grew out of his experiences as a trustee in Detroit and a study by Bankruptcy Judge Steven Rhodes. In addition, he said that recent test audits of 1,270 debtors' schedules disclosed hundreds of material misstatements of assets. Mr. Friedman stated that the vast majority of the bankruptcy judges and United States Trustee program staff with whom he has discussed the proposal support it. He said the two major trustee organizations, the National Association of Chapter 13 Trustees and the National Association of Bankruptcy Trustees, formally endorsed the EOUST proposal after the focus group meeting. Mr. Friedman said there is a significant problem with the accuracy of debtors' schedules and that the bankruptcy community has to recognize that problem and deal with it.

Mr. Friedman stated that the Subcommittee's revised amendment would be burdensome for trustees and the courts because trustees would be required to make written requests for financial information and the courts would have to hear objections to the requests. He said the discretionary provisions conflicted with the requirements in section 521 of the Bankruptcy Code that the debtor cooperate with the trustee and surrender property of the estate to the trustee,

including books, documents, records, and papers. Mr. Friedman said the statute does not require that the trustee request the documents or that the documents be reasonably necessary for the administration of the case. He said a third of the bankruptcy courts already have local rules, general orders, or standing orders requiring the production of financial documents and that the EOUST's proposed amendment would promote uniformity.

The Reporter asked whether there was a difference in the audit results between districts with a local rule or general order for production and those which do not have such a requirement. Mr. Friedman said that was not part of the study. Professor Coquillette asked whether the study addressed how many debtors file bankruptcy without an attorney. Judge Torres asked how requiring the debtor to produce this information would help since the schedules already ask that it be listed. Mr. Friedman stated that requiring debtors to bring the information to the meeting of creditors would educate debtors about what has to be reported on the schedules and it would protect the integrity of the system.

Judge Schell said bankruptcy is for the debtor's benefit, so why shouldn't the debtor have to bring documents to the meeting of creditors. Judge Swain stated that it is a matter of balancing the trustees' need for more documentation in a small percentage of their cases against the transaction cost of production in every case and forcing people out of the system. She stated that debtors would pay for copies and that trustees would bear the cost of handling the documents and protecting the debtor's privacy. Judge Klein suggested that the EOUST analyze the data on recoveries and payments to creditors by district. Judge Hartz stated that the Subcommittee on Consumer Issues should work with the EOUST to address the questions on the data in the audit study, including any correlation between local rules on production and debtors' material misstatements about assets. Mr. Friedman stated that outsiders are not allowed to participate in the deliberative process of the Department of Justice. He said he would try to get the data, but that there is a six-month delay. Mr. Niemic offered to pursue getting assistance from the FJC, if needed, to review the data.

The Committee discussed whether producing and reviewing financial documents at the meeting of creditors would disrupt and delay the meeting. Judge Montali said he has been told that the trustees are not burdened and the meetings are not disrupted in the 30 districts which have local rules for production. Mr. Frank said the original EOUST proposal to require production of 18 types of documents in every case was particularly burdensome, but that it would be a different matter to require conscientious attorneys to review the documents in preparing the debtor's schedules. Mr. Friedman suggested publishing a draft amendment which requires debtors to produce picture IDs, pay stubs, certificates of title, 1040 tax forms, and one bank statement for each account. Judge Montali suggested requiring a government-issued photo identification. Mr. Frank said it may be more sensible to require debtors to produce a short list of mandatory items such as a picture ID and proof of Social Security number, the debtor's most recent pay stub, the debtor's most recent tax return, title instruments, and a statement from each financial institution. Mr. Friedman said the proposed amendment should not bar more stringent local rules. Professor Resnick said that he was concerned that, if the proposed amendment

includes a statement that local rules can require additional documents, the statement might prompt a plethora of local rules. Professor Wiggins suggested deleting the phrase "setting forth" in line 27.

The Chairman asked the Reporter to consult with Mr. Friedman and Mr. Frank and prepare a revised draft of the proposed amendment to Rule 4002. After consulting with Mr. Friedman and Mr. Frank, the Reporter presented a revised draft which required the debtor to present picture identification, proof of Social Security number, and financial information including evidence of current income such as the debtor's most recent pay stub, the debtor's most recently filed federal income tax return, and statements for depository accounts. Two members suggested requiring government-issued picture identification. Two other members stated that there are other ways of proving the debtor's identity such as a birth certificate and a photo identification. One member stated that he is reluctant to specify picture identification prescribed by the United States trustee. The Committee discussed requiring picture identification issued by a "governmental unit" since that phrase is defined in section 101(27) of the Code.

Professor Resnick suggested revising lines 19 - 21 of the draft to state "An individual debtor shall bring to the meeting of creditors under section 341 of the Code picture identification issued by a governmental unit and . . ." He suggested that section (b)(2) be titled "Debtor's Duty to Provide Financial Documents." Judge McFeeley suggested inserting "or copies thereof" after the word "documents" in line 27 and adding brokerage accounts to section (b)(2)(C). Mr. Friedman suggested adding investment accounts to section (b)(2)(C). Professor Resnick suggested doing so by inserting "and investment" after the word "depository" in line 35. Professor Resnick suggested adding mutual funds and brokerage accounts to the same section. Mr. Adelman stated that the debtor may have received a W-2 form for the most recent tax year but either has not yet filed an income tax return or may not file a return for the year. He suggested dividing section (b)(2)(B) and requiring both the debtor's most recently filed federal income tax return and all Federal Tax Forms W-2 and 1099 for the most recent tax year.

Judge Montali stated that the draft is ambiguous on whether the debtor must bring the documents to the meeting of creditors for review or whether the debtor must produce the original documents or copies for the trustee. Mr. Friedman said he wanted to permit the debtor either to bring the documents for the trustee to review at the meeting or to bring copies for the trustee. If needed, the trustee could keep the originals long enough to make copies and note that on the record of the meeting. Mr. Frank said the parties will work it out if the rule does not specify.

Several Committee members questioned who could review the documents, which may include sensitive information, at the meeting of creditors. Mr. Friedman said debtors have been producing documents at the meeting for years but that the EOUST could issue guidance on the implementation of the new requirement. Professor Resnick noted that creditors may examine the debtor at the meeting. He asked whether, if the documents are produced at the meeting, creditors can question the debtor about the documents. Judge Swain suggested specifying that debtors bring the documents to the meeting "for examination by the trustee." Mr. Frank suggested that

debtors bring the documents to the meeting of creditors "and deliver them to the trustee." Judge Klein noted that the trustee is required to furnish information and documents to parties in interest. Judge Walker stated that the amendment should avoid ambiguity since the safeguards for a Rule 2004 examination are not in effect. He suggested that the amendment state that creditors may question the debtor but may not see the documents. One member stated that, if creditors can resolve a question at the start of the case, it is better for them to do that without resorting to a Rule 2004 examination.

Mr. Friedman stated that the rule should not micromanage the meeting of creditors, which the trustee conducts for the benefit of creditors. He said creditors' representatives attend the meeting to determine if the creditors should pursue dischargeability actions. Professor Resnick said debtors' tax returns are confidential and may include medical expenses, charitable deductions, children's Social Security numbers, and other sensitive information. In order to ensure that the documents are not sitting around the meeting room, he suggested specifying that the production is "for confidential review by the trustee." Mr. Friedman said the restriction could be included in the Committee Note.

The Chairman suggested adding "or bankruptcy administrator" after the word "trustee" in line 25. Judge Swain suggested inserting "for examination by the trustee" after the word "creditors" in line 28. The Chairman suggested that the proposed amendment be published for comment. He stated that the proposed amendment is not perfect but could be refined later. **The Chairman directed the Reporter to revise the draft and circulate it for consideration by the Committee.**

Rule 1009 - Amended Statement of Social Security Number. The EOUST's proposal included an amendment to Rule 4002 which stated that, if the debtor used an incorrect Social Security number in connection with the bankruptcy filing, the debtor must take steps to correct the bankruptcy court record and notify credit reporting agencies. One member stated that the impact of the debtor's use of an incorrect Social Security number may be worse for the person whose number is used than for the court. Judge McFeeley stated that the major credit bureaus get lists of debtors and their numbers daily but do not get updates unless somebody tells them.

Mr. Friedman stated that the United States Trustee Program tallied 8,006 improper Social Security numbers in bankruptcy cases last year. He said the debtor bar did not object to this part of the proposal because correcting the number is a simple process. He said the three largest national credit bureaus all have central addresses for such notices. Professor Resnick stated that he agrees with the EOUST's concern but has a problem with putting a social regulation in the procedural rules. He said the proposal is a good idea but that it is ambiguous and does not belong in the rules. One member stated that the proposal would require the debtor to correct a problem that came from the bankruptcy records. Mr. Waldron stated that the amendment should be more specific than requiring that the debtor "take steps to correct the bankruptcy court record." Mr. Frank suggested that the debtor be required to "submit an amended Statement of Social Security Number."

The Reporter suggested that the amendment be included in Rule 1009 instead of Rule 4002(a)(6). One member stated that most of Rule 1009 provides for permissive amendments but that the Amended Statement of Social Security Number would be mandatory and that the proposal would require notifying the credit bureaus. The Committee discussed whether the proposed amendment should be included in Rule 1007(f) or in Rule 1009 and whether the amendment should include a deadline for filing the amended statement. Professor Resnick moved to amend either Rule 1007 or Rule 1009 and to require that the debtor promptly notify creditors in the case. **The motion carried with two dissenting votes.** Judge McFeeley said he is not sure that the credit bureaus will get the change unless there is a provision to notify them.

The Reporter presented alternative draft amendments to Rules 1007 and 1009. He stated that an amendment to Rule 1009 would be more appropriate because that rule is about amendments and provides for notice. Judge Klein stated that subdivision (d) of the proposed amendment should include a reference to the new subdivision (c) as well as subsections (a) and (b) of the rule. Mr. Adelman asked about the use of the phrase "an amended verified statement" in light of the provision in Rule 1008 that all statements shall be verified. The Reporter stated that Rule 1007(f) refers to a "verified statement that sets out the debtor's social security number" and that the reference to a "verified statement" emphasizes the requirement. Professor Resnick suggested substituting "If the" for "Any" in line 3 and substituting "entities listed on the statement filed under Rule 1007(a)(1) or (2)" for "creditors" in line 7. Mr. Frank suggested substituting "only notice to creditors" for "sole notice to creditors" and striking "especially" in the penultimate sentence of the Committee Note. **The Chairman directed the Reporter to circulate a revised draft within two weeks and that Committee members email their comments to him and to the Reporter. Then the final version of the proposed amendment and the comments will be submitted for a vote.**

Rule 2016 Disclosure of Compensation. The EOUST had proposed that Rule 2016(b) be amended to require that the attorney for the debtor disclose all fees paid by or on behalf of the debtor in the year prior to the filing of the bankruptcy case, that the attorney disclose the details of the legal services to be provided in the bankruptcy case, and that both the attorney and the debtor sign the Rule 2016 disclosure. Mr. Frank stated that the Subcommittee on Consumer Issues initially agreed to recommend the amendment, but reversed its decision after further discussion. He said the Subcommittee concluded that the proposal presented a number of unresolved issues, including matters of attorney/client privilege and privacy.

Ms. Davis stated that the EOUST has learned that some attorneys mischaracterize or fail to disclose some of the payments they receive from the debtor. She said some attorneys have argued that part of their payments were for providing a medical power of attorney, a will, or some other legal services unrelated to the bankruptcy case, and, as a result, do not have to be disclosed. She said requiring the debtor to sign the disclosure will protect the debtor, who may be in a desperate situation. One member stated that the proposed amendment is based on the premise that lawyers lie and cheat but that a dishonest attorney would get around the disclosure requirement and lie. Professor Resnick said the proposal is inconsistent with the statute, which

only covers payments for services rendered or to be rendered in contemplation of or in connection with the bankruptcy case. He said there did not appear to be a compelling need for the disclosure, which might cause embarrassment, violate the debtor's privacy, or violate the attorney-client privilege.

Professor Coquillette stated that the states regulate the attorney-client privilege and that there is concern any time the Standing Committee considers a rule affecting attorney conduct. He stated that the EOUST proposal has wide-ranging ramifications. One member stated that debtors are already required to disclose payments to law firms concerning debt consolidation or bankruptcy in the one year prior to the bankruptcy filing in the Statement of Financial Affairs. He said it is easier for the attorney who gets the case to disclose all payments rather than trying to characterize them one way or another. Another member described the proposal as a means of protecting the debtor and said that he did not see a conflict with section 329 of the Code. He said the fact of a fee or representation generally is not a matter of privilege although there might be a privacy question. The Reporter stated that any fee recovered from the attorney would generally go to the bankruptcy estate, so the protection of the debtor against an overcharge is a side benefit.

One member stated that since the goal is to ferret out facts, maybe it would be better to ask the question at the meeting of creditors. Ms. Davis said the gist of the proposal is to make the standard for disclosure more objective so that attorneys know what to disclose. She said the attorney should not be the sole arbiter of whether the disclosure is required. **A motion to table the proposed amendment carried with one dissenting vote.**

Rule 7001 and Objections to Discharge. In 2003 the EOUST proposed that Rule 7001(4) be amended to permit a proceeding to object to or revoke the debtor's discharge under the provisions of section 727(a)(8) or section 727(a)(9) of the Code to be brought by motion. The proposal was discussed at the September 2003 meeting and was referred to the Subcommittee on Consumer Issues, which recommended that the Committee take no action on the matter. Mr. Friedman said the proposal stemmed from an effort to streamline the process. If the debtor is not entitled to a discharge, he asked, why should the rules require an adversary proceeding, a discovery conference, and, ultimately, a motion for summary judgment?

The Reporter stated that an objection under section 727(a)(8) based on a previous chapter 7 or chapter 11 discharge is an easy matter but that a section 727(a)(9) objection based on a previous discharge in chapter 12 or chapter 13 is more complicated. He stated that receiving a summons and complaint has a greater impact on the debtor than receiving a motion. A member suggested that the clerk would know if the debtor is not entitled to a discharge because of repeat filings. Another member said the debtor might not be the same person as the debtor in the earlier case. If the debtor is the same person, he said, the adversary proceeding should not be complicated. A third member said that, if no one objected to the discharge of a repeat filer, Rule 4004(c) would appear to require that the clerk issue the discharge. **Judge Walker's motion to make no change in the rule carried without dissent.**

Schedule I. The EOUST also had proposed that Schedule I of Official Form 6 be amended to include the income of non-filing spouses in chapter 7 cases, as is already the case in chapter 12 and chapter 13 cases. The Committee approved the request at its September 2003 meeting but did not approve a Committee Note for the proposed amendment. Ms. Ketchum stated that many questions on the Statement of Financial Affairs also ask for information about a non-filing spouse of a married debtor in chapter 12 or chapter 13. She asked the Committee to consider whether information about the non-filing spouse of a chapter 7 debtor should be requested on Schedule I but not on the Statement of Financial Affairs and why the information should be requested in chapter 7 cases but not in chapter 11 cases.

Professor Resnick stated that the EOUST just asked for help in determining whether to file a section 707(b) motion. Mr. Friedman said the parties in a chapter 11 case are more litigious and request more information, so there is less need to require the information on the schedule. He said Schedule I is the one place to look for section 707(b) information, so there is no need to ask the question on the Statement of Affairs. Ms. Davis said Schedule I is used as a red flag where the United States trustee starts its inquiry. Judge Klein suggested that the Committee consider revising the Statement of Financial Affairs. **The Chairman said revision of the Statement of Financial Affairs would be included on the agenda for the September meeting.** The Chairman said the last sentence of the proposed Committee Note should be deleted because the proposed amendment to Schedule I only covers chapter 7 cases.

Professor Resnick suggested revising the Committee Note to state that the information would help the United States trustee in jurisdictions where a non-filing spouse's income is considered relevant to determination of a section 707(b) motion. Ms. Davis said the information also could be used to determine the dischargeability of a student loan in a hardship case. Mr. Shaffer suggested that the Committee Note state that the relevancy of the information for section 707(b) litigation is beyond the scope of these rules.

The Reporter submitted a revised draft of the proposed Committee Note which stated that the information may be relevant to section 707(b) of the Code or other financial determinations, but that the relevance of any particular information is a matter of substantive law and is beyond the scope of the rules. **After striking "of any particular information," creating two sentences from the proposed single sentence, and inserting "to 707(b) or other determinations" in the new final sentence, the Committee approved the proposed Committee Note for publication.**

Rule 3007 Objections to Claims. Rule 3007 governs objections to claims. In most instances, a party in interest files an objection to claim, and the matter proceeds as a contested matter under Rule 9014. If, however, an objection to claim is joined with a demand for relief of the kind specified in Rule 7001, Rule 3007 provides that the matter becomes an adversary proceeding. The rule does not, however, provide any direction as to the consequences of this transformation. Judge Klein told the Committee at the September 2003 meeting that there is confusion in the courts as to whether a separate adversary proceeding must be filed. The Committee directed the Reporter to draft an amendment to clarify the provision. The Reporter

presented a draft amendment which provided that if an objection to claim is joined with a demand for relief of the kind specified in Rule 7001, the action becomes an adversary proceeding, the objection is deemed to be a complaint, and all of the 7000 rules apply. The Reporter said this would allow the action to go forward under the appropriate set of rules rather then requiring a new start.

Judge Klein recommended not going forward with the proposed amendment because it might change the status quo, particularly as to issue preclusion and claims preclusion. He stated that, if the trustee does not object to a claim, the trustee might be precluded from filing an adversary proceeding concerning the claim. A member suggested providing that if an objection includes a demand for relief of the kind specified in Rule 7001, it must be brought as an adversary proceeding. The Reporter stated that there has been concern that the court would go through the entire process of considering an objection to claim and then a party would assert that the court should start over because the objection should have been an adversary proceeding. A member said the party may have waived the issue by waiting so long to raise it.

Judge Montali suggested that an objection to claim could be viewed as a counterclaim since it is a response to the claim. The Reporter said a problem often arises when the trustee objects to a claim without filing a complaint, and the creditor defaults. Judge Klein said objections to claim are often filed in bulk and many are resolved by default. A member said the problem is who stands up and says this is an adversary proceeding. Another member said he did not like the proposed draft because the party responding to the objection to claim shouldn't have to raise the adversary proceeding issue.

One member suggested stating that a demand for relief of the kind specified in Rule 7001, must be brought as an adversary proceeding. Others suggested separating the objection to claim and the Rule 7001 relief, and treating them as two proceedings. Judge Walker said sloppy drafting might result in an unopposed objection to claim being denied because it should have been brought as an adversary proceeding. **The Committee agreed to refer the proposal for further study. The Chairman referred the matter to the Subcommittee on Attorney Conduct and Health Care.**

Rules 7054 and 7023, Costs and Class Proceedings. Rule 7054 incorporates the provisions of Civil Rule 54(a) - (c). The provisions of Civil Rule 54(d) are not included because Rule 7054(b) has its own provisions for costs. Effective December 1, 2003, however, Civil Rule 23 was amended to add new subdivisions (g) and (h). Rule 23(h) provides for the award of attorney fees in class actions, including Rule 54(d)(2) motions and references to a special master or magistrate judge under Rule 54(d)(2)(D). Because Rule 7023 incorporates all of Rule 23, the new Rule 23(h) seems to apply to the award of fees in adversary proceedings, including the two provisions of Rule 54(d).

The Reporter presented drafts of two proposed amendments. The draft amendment to Rule 7054 provided that, except as provided in Rule 7023, Civil Rule 54(d) does not apply in an

adversary proceeding. The draft amendment to Rule 7023 provided that Civil Rule 23 applies in adversary proceedings with the exception of subdivision (h)(4) of the Civil Rule. That subdivision provides for referring attorney fee awards to a magistrate judge or a special master, which is prohibited by Rule 9031. Professor Resnick said he preferred the latter approach because it would not authorize the reference of bankruptcy matters to a special master or magistrate judge but would incorporate the other provisions for costs and attorney fees. The Committee discussed either excluding all of the provisions of Rule 23(h) or excluding the provisions of Rule 23(h)(4) and providing that costs cannot be taxed to the estate. **The Chairman referred the matter to the Subcommittee on Business Matters for a recommendation at the September meeting.** The Chairman stated that the proposed amendment might be a technical one which would not require publication.

Rule 7005.1 Certification of Constitutional Questions. Civil Rule 24(c) currently sets the procedure when a party challenges the constitutionality of a federal or state statute. The provisions of Rule 24 are incorporated by Rule 7024. A proposed new Civil Rule 5.1 which would replace a portion of Rule 24(c) was published for comment in August 2003. The Reporter stated that the reference to Rule 24(c) would no longer work and that the new provision also should apply to contested matters.

The Reporter presented a draft of a new Rule 7005.1, which provided that the court shall set a time of not less than 35 days from the Rule 5.1(b) certification for intervention by the Attorney General or the State Attorney General. Mr. Kohn stated that the federal government needs a minimum of 60 days to intervene because of the need to work with counsel for the affected agency, to get internal authorization to participate in the case, and to brief the issues. He said state governments might need even more time to intervene in out-of-state cases. The Committee discussed the court's discretion to give the government additional time to intervene, what would happen if the court proceeded without government intervention, and whether the government would be precluded from intervening later. Mr. Kohn said the Attorney General sometimes writes the court, declining to intervene, and citing case law that the constitutional challenge is frivolous.

The Committee agreed to delete paragraph (b) of the Reporter's proposed amendment, which provided that the government has not less than 35 days to intervene. The Committee discussed whether the proposed rule should apply in contested matters. Professor Resnick stated that the proposed amendment could be considered a technical amendment which does not require publication if, like the existing rule, it does not automatically apply in contested matters. The Chairman stated that the court has a duty under 28 U.S.C. § 2403 to certify constitutional challenges to the Attorney General of the United States or the attorney general of the state. **Professor Resnick's motion to approve a new Rule 7005.1 which incorporates all of proposed Civil Rule 5.1 and applies only in adversary proceedings carried without dissent. The Committee agreed that this would be a technical amendment which would not require publication and could take effect on December 1, 2005, the same time as the proposed Civil Rule.**

Revision of Form 10. The Administrative Office's Bankruptcy CM/ECF Working Group has proposed revising Official Bankruptcy Form 10, Proof of Claim, and creating a new Director's Procedural Form, Notice of Transfer of Claim. The Working Group's Claims Processing Subcommittee prepared the proposal with help from trustees, large creditors, clerks, and judges in an effort to define electronic claims information; facilitate electronic filing of claims by national, high volume creditors; and make it easier for creditors, the courts, and trustees to process claims electronically. The claims group indicated that, in the future, large creditors would file their claims as a stream of electronic data transmitted to the court or to a contractor functioning as a national portal which would process the information for the court.

Several Committee members questioned whether a proof of claim filed without documentation constitutes prima facie evidence of the validity and amount of the claim, as specified in Rule 3001(f). One member noted that the documentation could be scanned and filed as an attachment to a claim filed electronically. Another member expressed concern about the statement in box 7 that redacted pages from security documents should be attached to the claim because the revised form did not specify how the redaction should be made. The Committee discussed the deletion of the question "Date debt was incurred" from box 2 on the existing form.

Director's Procedural Forms do not require approval by the Committee but Ms. Ketchum said the Administrative Office would welcome the Committee's input on the proposed notice form. Judge McFeeley stated that the claims group developed the Director's Form to make it easier for clerks to notify alleged claims transferors, as required by Rule 3001(e)(2). The alleged transferee would submit a partially completed notice along with evidence of the transfer. Then the clerk would transmit the completed notice to the alleged transferor.

Mr. Waldron stated that the clerk should use the transferor's address in the court's computer system rather than relying on the transferee to provide the address in the notice, which could facilitate fraud. Professor Resnick stated that the reference to the unconditional sale and transfer of the claim should be deleted from the first paragraph of the proposed form because Rule 3001(e) is not limited to unconditional transfers. Mr. Frank suggested that the title of the form include "Deadline for Objections" in large type. **The proposed amendment to Official Form 10 and new procedural form were referred to the Subcommittee on Forms for review. The Subcommittee also will review proposed changes to the Instructions, the policy issue of how much information should be attached to the Proof of Claim, and the impact of the E-Government Act.**

An attorney in the Bankruptcy Judges Division, newly hired from private practice, has suggested amending page 2 of Official Form 10 to help eliminate confusion over what is meant by the words "replace" and "amends" in connection with a previously filed claim. **Because one of the recommendations by the CM/ECF Working Group would affect the same section of the Official Form, this suggestion was referred to the Subcommittee on Forms for review in conjunction with the other recommendations.**

Privacy Amendments to Forms 10, 16D, and 17. Ms. Ketchum stated that since the privacy-related amendments took effect on December 1, 2003, it has come to her attention that there are three Official Forms that require conforming amendments. The three forms are Form 10, Proof of Claim; Form 16D, Caption for Use in Adversary Proceeding Other than for a Complaint Filed by a Debtor; and Form 17, Notice of Appeal.

As amended in December 2003, Form 10 provides that a wage claimant disclose only the last four digits of the claimant's Social Security number. Court personnel, however, have pointed out that there is not a similar limitation on the "Account or other number by which creditor identifies debtor." With the abrogation of Form 16C, Caption of Complaint in Adversary Proceeding Filed by a Debtor, in December 2003, it is not appropriate to continue to use the phrase "other than for a complaint filed by a debtor." In addition, the cross-reference in the note should be changed from the abrogated Form 16C to Form 16A. The cross-reference to Form 16C also should be removed from the directions on the caption to use for Form 17.

Mr. Adelman suggested revising the instructions for Form 16D to require the last four digits of the debtor's Social Security number, instead of the full number. Judge Klein suggested deleting the reference to section 158(b) from Form 17. As all of the amendments are conforming ones, the proposals could be forwarded to the Standing Committee and the Judicial Conference without publication for comment. **A motion to approve the recommended changes carried without objection. The proposed amendments to Forms 16D and 17 will be submitted to Standing Committee for approval at its June meeting. The proposed amendment to Form 10 will be submitted to the Standing Committee after the Subcommittee on Forms has reviewed the other proposed changes in the Proof of Claim.**

Information Items

Bankruptcy Abuse Prevention and Consumer Protection Act of 2004. Mr. Rabiej reported that the bill, which passed the House of Representatives on January 28, 2004, is still pending in the Senate.

Restyling the Civil Rules. Professor Resnick stated that he had made a quick review of the proposed revisions and that the only ones which would affect the Bankruptcy Rules appeared to be changes in section numbers and subsection numbers. He stated that these changes would be technical amendments and that he saw no reason not to incorporate the revisions in the Bankruptcy Rules.

E-Government Act. The Reporter discussed the first meeting of the Standing Committee's E-Government Subcommittee, which is coordinating the efforts the various advisory committees with respect to the requirement in the E-Government Act of 2002, Pub. L. 107-347, for rules protecting privacy and security concerns. A rules template has been prepared which will form the basis of the Civil Rule. The Reporter stated that the only real question about

using the same rule in bankruptcy is the requirement that only the city and state be specified for home addresses. The Committee discussed the use of the debtor's home address in bankruptcy cases, including motions for relief from the automatic stay. One member stated that any materials filed with the court, including checks and correspondence, would have to be redacted in order to protect home addresses.

The Chairman stated that the current plan is for this Committee to adopt a rule that incorporates the Civil Rule, with modifications reflecting the special needs of the bankruptcy system. **The Chairman stated that he would communicate this to the chair of the Civil Rules Committee, which meets in April, and that this Committee could discuss any action taken by the Civil Rules Committee at its meeting in September.** Mr. Rabiej suggested that Committee members consider the template as a concept and that they give their comments to the Reporter for discussion at the spring meeting.

FJC Study of Mandatory Disclosure under Civil Rule 26. Mr. Niemic discussed the results of the FJC study of whether certain types of adversary proceedings should be exempted by rule from the mandatory disclosure provisions of Rule 7026 and Civil Rule 26. Mr. Niemic stated that the judges' responses to the survey suggested that the Committee may wish to consider the presumptive exemption (with exceptions) of several types of adversary proceedings including proceedings to obtain approval for the sale of property of the estate and a co-owner, to compel the turnover of property of the estate, to obtain injunctive relief or to reinstate the automatic stay, and to determine the dischargeability of debts for support and alimony. **The Chairman referred the study to the Subcommittee on Privacy, Public Access, and Appeals and asked that the Subcommittee make a report with recommendations at the September meeting.**

Electronic Discovery Conference. Professor Resnick and Judge McFeeley reported on the conference on electronic discovery sponsored by the Civil Rules Committee on February 20-21, 2004, at Fordham University School of Law. Professor Resnick said it is amazing what is retained on computers and how difficult it is to delete the information without destroying the machine. Judge McFeeley said the discussion was fascinating and that many of the problems raised will be very difficult to solve. He said big companies are sued almost daily and, as a result, must preserve electronic information at a high cost.

Other Information Matters. The other Information Items are set out in the agenda materials for the meeting.

Administrative Matters

The Committee's next scheduled meeting will be at the Ritz-Carlton Hotel, Half-Moon Bay, CA, on September 9-10, 2004. The Committee discussed several locations as possible sites of the spring 2005, meeting, including Savannah, GA, Point Clear, AL, Ft. Myers, FL, and South

Florida generally. March 10-11 are the most likely dates. The Chairman asked Committee members to send him their ideas.

Respectfully submitted,

James H. Wannamaker, III

struck by the testimony of Judge Diane P. Wood and particularly her description of the dramatically different caseloads that the circuits confront and the dramatically different publication rates and other practices that the circuits have adopted to deal with those caseloads. This is an area in which one size does not fit all.

The Committee discussed whether action on Rule 32.1 should be postponed and the FJC invited to study some of the claims made by the commentators. One member argued in favor of such a postponement. He said that conflicting empirical claims are at the heart of the dispute over Rule 32.1. Some of those issues could be studied by the FJC or another neutral party. For example, the FJC could study whether the courts that have liberalized or abolished no-citation rules have been slower to issue opinions or have more frequently resorted to issuing one-line judgments. The member believes that most judges are willing to consider empirical evidence and reassess their positions if appropriate. The member cited himself as an example. He formerly favored no-citation rules, but, after his court liberalized its citation rules, parties did not often cite unpublished opinions, and the judges on his court did not spend more time drafting them. The member is afraid that other judges have not yet had an opportunity to be convinced by empirical evidence, as he was. Unless a better case is made for Rule 32.1, he fears that the proposed rule will not be approved by the Judicial Conference.

A majority of Committee members disagreed. They argued that such a study would be difficult to conduct. Many of the commentators' claims are incapable of being tested at all; others can be tested only with great effort and expense; and still others can be tested only through surveys, which would likely produce unreliable data. Members also thought that little good would come from such a study. Both those who support and those who oppose Rule 32.1 are motivated to a significant extent by philosophical or political beliefs that are not capable of being refuted by empirical evidence. Also, opponents of Rule 32.1 are unlikely to be persuaded by empirical evidence because they will insist that the problems of their circuits are unique. In short, the prospect of anything worthwhile coming out of a study is too remote to justify the considerable time and effort that would have to be invested by the FJC. The issue is "joined" now; it's time to send the rule to the Standing Committee.

A member moved that Rule 32.1 be approved. The motion was seconded. The motion carried. (The vote among members present was 6-1, but a member who was unavoidably absent later informed the Committee that he would have voted against the proposed rule.)

The Committee considered three suggested changes to Rule 32.1:

1. The first was a proposal to amend Rule 32.1 to make it prospective only — that is, to provide that it applies only to unpublished opinions issued after its effective date. The member who proposed the amendment noted that several commentators had argued for this change, and he pointed out that when the D.C. Circuit recently liberalized its citation rule, the court applied the new rule prospectively. He also said that it is not fair for judges who reasonably relied upon no-citation rules in deciding how to draft opinions to now see those opinions cited back to them.

Other Committee members opposed the amendment. They pointed out that a rule that applied only prospectively — that permitted circuits to continue to ban the citation of tens of thousands of their own opinions — would be inconsistent with almost all of the reasons why the Committee had approved Rule 32.1. How can the Committee argue, for example, that Article III courts should not be able to bar citation of their own opinions, or that attorneys should not be forbidden from making the best arguments they can on behalf of their clients, or that uniformity among the circuits is important, and then approve a rule that allows Article III courts to bar such citation, allows attorneys to be forbidden to make such arguments, and leaves disuniformity in place? Moreover, a prospective-only rule would appear to endorse the argument that judges will have to spend much more time drafting unpublished opinions if they are citable, an argument that has been rejected by virtually every Committee member and that is not supported by any empirical evidence. Any "reliance" interest of judges who drafted unpublished opinions under no-citation rules is weak, especially given that judges can continue to treat those opinions as non-binding under Rule 32.1. This weak reliance interest should not overcome the strong public interests that have persuaded the Committee to approve Rule 32.1.

Committee members also expressed concern that a prospective-only rule would create a patchwork of rules and make the disuniformity problem even worse. A single court such as the D.C. Circuit might end up with one rule that governs the citation of one group of unpublished opinions, a second rule that governs the citation of another group, and a third rule (Rule 32.1) that governs the citation of yet another group.

The proposed amendment was withdrawn after it became clear that it did not enjoy the support of more than one or two Committee members. But Committee members also agreed that a prospective-only rule would be better than no rule at all, and thus the Committee would be open to reconsidering the amendment if Rule 32.1 is not approved in its present form.

2. The second proposed change to Rule 32.1 related to what Prof. Stephen Barnett refers to as "discouraging words" — that is, provisions in local circuit rules that bar the citation of unpublished opinions when published opinions address the same point or that instruct attorneys that the citation of unpublished opinions under any circumstance is disfavored. One member suggested that Rule 32.1 be amended either to incorporate discouraging words itself or to permit the circuits to implement local rules that include discouraging words (the approach favored by Prof. Barnett). The member argued that such a rule would overrule the practices of only the four circuits that altogether forbid the citation of unpublished opinions for their persuasive value and would leave in place the practices of the other nine circuits. Thus, such a rule might stand a better chance of being approved than Rule 32.1, which would overrule the practices of all of the circuits to at least some extent.

Several Committee members and the Reporter expressed a number of concerns about such an approach:

First, virtually none of the reasons given by the Committee for approving Rule 32.1 could be given to justify a rule that permitted discouraging words. Under such a rule, an Article III court could still bar an attorney from citing the court's own words. A party could still be forbidden from asking the court to treat it consistently with a prior litigant. Attorneys could still be barred from making arguments that, in their professional judgment, would advance their clients' causes. Attorneys who practice in more than one circuit would still face an array of inconsistent rules.

Second, what would be the point of such a rule? The Committee has not been motivated to act by a desire to force the small minority of circuits who allow no citation of unpublished opinions for their persuasive value to instead allow a little bit. Rather, the Committee has objected to the fact that virtually all of the circuits impose unjustifiable prohibitions or restrictions on such citation.

Third, a rule permitting circuits to use discouraging words would put the Committee in the position of taking the anti-*Anastasoff* side of the debate over the lawfulness of treating unpublished opinions as non-binding. Endorsing the use of discouraging words necessarily endorses the view that the actions of an Article III court can be divided into two categories: binding decisions that are fully citable and non-binding decisions that are not. Prof. Barnett favors the use of discouraging words precisely because he believes *Anastasoff* was wrong. But this Committee has gone out of its way to avoid expressing a view on *Anastasoff*.

Finally, it would be difficult to draft a rule that permitted courts to restrict, but not altogether to prohibit, the citation of unpublished opinions. No circuit completely prohibits such citation; all circuits allow unpublished opinions to be cited for at least some purposes. Thus, a rule that merely provided that a court could not prohibit the citation of unpublished opinions would not require any circuit to change its current practices. To be effective, then, the rule would have to instruct courts that they must permit unpublished opinions to be cited for more than just "case-specific" reasons (such as res judicata), while also making clear that courts are free to restrict such citation as much as they want (short of prohibiting it altogether). That would be a difficult concept to capture in a rule of appellate procedure.

Other Committee members did not disagree with these objections, but suggested that, if the choice is between no rule and a rule that allows discouraging words, the latter would be preferable. It would move courts in the right direction and lay the groundwork for approval of a more sweeping rule in a few years. In addition, such a rule would, as a *practical* matter, have almost the same effect as Rule 32.1. A typical attorney is not going to cite unpublished opinions if there are published opinions on point, and, even if he does, it is highly unlikely that he will be sanctioned. After all, the attorney's opponent will have no incentive to point out to the court that a published opinion supports the same proposition, and the courts are too busy to get involved in disputes over whether a particular published opinion was as closely on point as a particular unpublished opinion.

Members who opposed amending Rule 32.1 to permit discouraging words responded that, for exactly these reasons, a watered-down version of Rule 32.1 was unlikely to win the approval of those who support no-citation rules. They will recognize it for the camel's nose that it is, and oppose it just as vigorously as they have opposed Rule 32.1. If political expediency is the only argument that can be made for the watered-down version, and if the watered-down version is unlikely to be politically expedient, then why support it?

No member of the Committee moved to amend Rule 32.1 to permit courts to implement local rules that restrict or discourage citation of unpublished opinions. It was clear that most members would not support such an amendment at this time. But the Committee agreed that, if either the Standing Committee or the Judicial Conference declines to approve Rule 32.1, the possibility of approving a more limited version of the rule would remain open.

3. The final proposed change to Rule 32.1 was recommended by the Reporter. He suggested that the Committee amend the text of Rule 32.1(a) to delete everything after "or the like," so that Rule 32.1(a) would provide as follows:

> **(a)** **Citation Permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like.

The published version of Rule 32.1(a) was trying to do two things. On the one hand, the Committee wanted to require courts to permit the citation of unpublished opinions. The Committee did not want a court to be able to permit such citation as a formal matter but then, as a practical matter, make such citation nearly impossible by imposing various restrictions upon it. On the other hand, the Committee did not want to preclude circuits from imposing general requirements of form or style upon the citation of *all* authorities.

The Reporter said that he had been persuaded that the clause "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions" was not necessary. First, Rule 32(e)[1] was intended to put the circuits out of the business of imposing general requirements of form or style. It is hard to identify a requirement of form or style that could be both endangered by Rule 32.1 and enforced under Rule 32(e). Second, Rule 32.1 is most naturally read as precluding only prohibitions and restrictions on the citation of unpublished opinions *as such* — that is, prohibitions and restrictions aimed *exclusively* at the citation of unpublished opinions. A page limit on a brief could be said indirectly to "restrict" the citation of unpublished opinions, but no one is likely to

[1]Rule 32(e) provides: "Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule."

read Rule 32.1 to forbid page limits on briefs, especially if the Committee Note is clear about the scope of the rule.

A member moved that Rule 32.1 be amended as the Reporter had recommended. The motion was seconded. The motion carried (6-0, with one abstention).

The Reporter said that he would revise the Committee Note to reflect the amendment and to strengthen the arguments for the new rule. After Judge Alito has an opportunity to review the revised Note, the Reporter will circulate it to Committee members via e-mail.

2. Rule 4(a)(6) (clarify whether verbal communication provides "notice") [Item No. 00-08]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party

receives or observes written notice of the entry from any source, whichever is earlier;

~~(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry;~~ and

(C) the court finds that no party would be prejudiced.

* * * * *

Committee Note

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what kind of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what kind of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one important substantive change has been made.

Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of

a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what kind of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) — has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

New subdivision (a)(6)(B) makes clear that only *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal that judgment or order. However, all that is required is that a party receive or observe written notice of the entry of the judgment or order, not that a party receive or observe a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)'s] seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir. 2001) (footnotes omitted). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has observed written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received or observed written notice. However, an oral communication is not written notice for purposes of new subdivision (a)(6)(B), no matter how specific, reliable, or unequivocal.

Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period to move to reopen the time to appeal under former subdivision (a)(6)(A). The majority of circuits held that only written notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be deemed "the functional equivalent of written notice" if they were sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 304-05 (2d Cir. 1999)).

New subdivision (a)(6)(B) resolves this circuit split by making clear that only receipt or observation of *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal.

The Reporter reminded the Committee that the proposed amendment is intended to do two things:

First, proposed subdivision (A) is intended to clarify what type of notice precludes a party from taking advantage of Rule 4(a)(6)'s safe harbor. Proposed subdivision (A) makes clear that only Civil Rule 77(d) notice disqualifies a party from later moving to reopen the time to appeal under Rule 4(a)(6). All commentators agreed that proposed subdivision (A) made sense, and the Reporter recommended that it be approved.

Second, proposed subdivision (B) is intended to clarify what type of notice triggers the 7-day period to move to reopen. Proposed subdivision (B) provides that the 7-day deadline begins to run when a party "receives or observes written notice of the entry from any source." The Reporter said that he agreed with commentators — formal and informal — who objected to this proposed formulation. Above all else, the Reporter said, subdivision (B) should be clear and easy to apply; it should neither risk opening another circuit split over its meaning nor create the need for a lot of factfinding by district courts. Subdivision (B) could do better on both counts. The standard — "receives or observes written notice of the entry from any source" — is awkward and, despite the guidance of the Committee Note, seems likely to give courts problems. Even if the standard is sufficiently clear, district courts will be left having to make factual findings about whether a particular attorney or party "received" or "observed" notice that was written or electronic.

The Reporter recommended that the Committee adopt the solution recommended by two committees of the California bar: using Civil Rule 77(d) notice to trigger the 7-day period. The standard is clear; no one doubts what it means to be served with notice of the entry of judgment under Civil Rule 77(d). The standard is also unlikely to give rise to many factual disputes. Civil Rule 77(d) notice must be formally served under Civil Rule 5(b), so establishing the presence or absence of such notice should be relatively easy. And using Civil Rule 77(d) as the trigger would not unduly delay appellate proceedings, mainly because Rule 4(a)(6) applies a "hard cap" of 180 days. The wording of subdivision (B) will only determine when *within* those 180 days the 7-day deadline is triggered.

For these reasons, the Reporter recommended that the Committee amend the text of proposed subdivision (B) to provide as follows:

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier;

He also recommended that the Committee Note to proposed subdivision (B) be amended to read as follows:

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included verbal notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 304-05 (2d Cir. 1999)).

Former subdivision (a)(6)(A) — new subdivision (a)(6)(B) — has been amended to resolve this circuit split. Under new subdivision (a)(6)(B), only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period. Using Civil Rule 77(d) notice as the trigger has two advantages: First, because Civil Rule 77(d) is clear and familiar, circuit splits are unlikely to develop over its meaning. Second, because Civil Rule 77(d) notice

must be served under Civil Rule 5(b), establishing whether and when such notice was provided should generally not be difficult.

Using Civil Rule 77(d) notice to trigger the 7-day period will not unduly delay appellate proceedings. Rule 4(a)(6) applies to only a small number of cases — cases in which a party was not notified of a judgment or order by either the clerk or another party within 21 days after entry. Even with respect to those cases, no appeal can be brought more than 180 days after entry, no matter what the circumstances. In addition, Civil Rule 77(d) permits parties to serve notice of the entry of a judgment or order. The winning party can prevent Rule 4(a)(6) from even coming into play simply by serving notice of entry within 21 days. Failing that, by later serving notice, the winning party can trigger the 7-day deadline to move to reopen.

The Committee briefly discussed the Reporter's recommendation. All Committee members concurred that the recommendation should be adopted. Most of the discussion related to the length of the Committee Note, with some members arguing that the Note should just briefly describe the effect of the amendment, and others arguing that the Note should also explain the background to and reasons for the amendment. The Committee compromised by agreeing that the Note would be changed so that the effect of the amendment is briefly described at the beginning of each section of the Note, and then the background and reasons would follow.

A member moved that the amendment to Rule 4(a)(6) be approved, with the changes recommended by the Reporter, and with the understanding that the Reporter would revise the Committee Note as agreed. The motion was seconded. The motion carried (unanimously).

3. Washington's Birthday Package: Rules 26(a)(4) and 45(a)(2) [Item No. 00-03]

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

* * * * *

Committee Note

Subdivision (a)(4). Rule 26(a)(4) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

Rule 45. Clerk's Duties

(a) General Provisions.

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days

except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

* * * * *

Committee Note

Subdivision (a)(2). Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

The Reporter said that no commentator objected to the amendments and that he recommended that they be approved.

A member moved that the amendments to Rules 26(a)(4) and 45(a)(2) be approved as published. The motion was seconded. The motion carried (unanimously).

4. New Rule 27(d)(1)(E) (apply typeface and type-style limitations to motions) [Item No. 02-01]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 27. Motions

* * * * *

(d) Form of Papers; Page Limits; and Number of Copies.

(1) **Format.**

(A) **Reproduction.** A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) **Cover.** A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(C) **Binding.** The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(D) **Paper size, line spacing, and margins.** The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all

four sides. Page numbers may be placed in the margins, but no text may appear there.

(E) **Typeface and type styles.** The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

* * * * *

Committee Note

Subdivision (d)(1)(E). A new subdivision (E) has been added to Rule 27(d)(1) to provide that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6). The purpose of the amendment is to promote uniformity in federal appellate practice and to prevent the abuses that might occur if no restrictions were placed on the size of typeface used in motion papers.

The Reporter said that only two objections had been made to the proposed amendment:

First, two commentators argued that all of the page limits in the Appellate Rules should be replaced by word limits. The Reporter reminded the Committee that it had recently removed the same suggestion from its study agenda at the request of the appellate clerks. The clerks reported that page limits are much easier for clerks to enforce and that abuses are rarely a problem with respect to papers governed by page limits. If the rules were to apply word limits to all papers (not just briefs), then parties would have to file certificates of compliance with all papers (not just briefs). That would result in tens or hundreds of thousands of additional pieces of paper being served and filed every year — all for no purpose.

Second, one commentator objected that, because most circuits now allow motions to be filed in 12- or even 11-point proportional font, the proposed amendment will substantially reduce the content of motion papers in most circuits. The commentator argued that the page limits on motion papers should be increased to compensate for this reduction.

A member said that, while he disagreed with the second suggestion, he would like the Committee to consider replacing all page limits in the Appellate Rules with word limits. He believes that the suggestion is worth considering, and he was not a member of the Committee when it removed the suggestion from its study agenda. That said, he did not want to hold up

approval of the amendment to Rule 27(d)(1). The Committee agreed by consensus that it would restore the suggestion to its study agenda.

A member moved that the amendment to Rule 27(d)(1) be approved as published. The motion was seconded. The motion carried (unanimously).

5. Cross-Appeals Package: Rules 28(c) and 28(h), new Rule 28.1, and Rules 32(a)(7)(C) and 34(d) [Item No. 00-12]

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 28. Briefs

* * * * *

(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. ~~An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal.~~ Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities — cases (alphabetically arranged), statutes, and other authorities — with references to the pages of the reply brief where they are cited.

* * * * *

~~**(h) Briefs in a Case Involving a Cross-Appeal.** If a cross-appeal is filed, the party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30, 31, and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order. With respect to~~

~~appellee's cross-appeal and response to appellant's brief, appellee's brief must conform to the requirements of Rule 28(a)(1)–(11). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.~~ [Reserved]

* * * * *

Committee Note

Subdivision (c). Subdivision (c) has been amended to delete a sentence that authorized an appellee who had cross-appealed to file a brief in reply to the appellant's response. All rules regarding briefing in cases involving cross-appeals have been consolidated into new Rule 28.1.

Subdivision (h). Subdivision (h) — regarding briefing in cases involving cross-appeals — has been deleted. All rules regarding such briefing have been consolidated into new Rule 28.1.

Rule 28.1. Cross-Appeals

(a) **Applicability.** This rule applies to a case in which a cross-appeal is filed. Rules 28(a)-(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)-(B) do not apply to such a case, except as otherwise provided in this rule.

(b) **Designation of Appellant.** The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by agreement of the parties or by court order.

(c) **Briefs.** In a case involving a cross-appeal:

(1) **Appellant's Principal Brief.** The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(2) **Appellee's Principal and Response Brief.** The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(3) **Appellant's Response and Reply Brief.** The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(4) **Appellee's Reply Brief.** The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule

28(a)(2)–(3) and (11). That brief must also be limited to the issues presented by the cross-appeal.

(5) **No Further Briefs.** Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(d) Cover. Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; and the appellee's reply brief, gray. The front cover of a brief must contain the information required by Rule 32(a)(2).

(e) Length.

(1) **Page Limitation.** Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation.**

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(3) **Certificate of Compliance.** A brief submitted under Rule 28(e)(2) must comply with Rule 32(a)(7)(C).

(f) Time to Serve and File a Brief. The appellant's principal brief must be served and filed within 40 days after the record is filed. The appellee's principal and response brief must be served and filed within 30 days after the appellant's principal brief is served. The appellant's response and reply brief must be served and filed within 30 days after the appellee's principal and response brief is served. The appellee's reply brief must be served and filed within 14 days after the appellant's response and reply brief is served, but the appellee's reply brief must be filed at least 3 days before argument, unless the court, for good cause, allows a later filing.

Committee Note

The Federal Rules of Appellate Procedure have said very little about briefing in cases involving cross-appeals. This vacuum has frustrated judges, attorneys, and parties who have sought guidance in the rules. More importantly, this vacuum has been filled by conflicting local rules regarding such matters as the number and length of briefs, the colors of the covers of briefs, and the deadlines for serving and filing briefs. These local rules have created a hardship for attorneys who practice in more than one circuit.

New Rule 28.1 provides a comprehensive set of rules governing briefing in cases involving cross-appeals. The few existing provisions regarding briefing in such cases have been moved into new Rule 28.1, and several new provisions have been added to fill the gaps in the existing rules. The new provisions reflect the practices of the large majority of circuits and, to a significant extent, the new provisions have been patterned after the requirements imposed by Rules 28, 31, and 32 on briefs filed in cases that do not involve cross-appeals.

Subdivision (a). Subdivision (a) makes clear that, in a case involving a cross-appeal, briefing is governed by new Rule 28.1, and not by Rules 28(a), 28(b), 28(c), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B), except to the extent that Rule 28.1 specifically incorporates those rules by reference.

Subdivision (b). Subdivision (b) defines who is the "appellant" and who is the "appellee" in a case involving a cross-appeal. Subdivision (b) is taken directly from former Rule 28(h), except that subdivision (b) refers to a party being designated as an appellant "for the purposes of this rule and Rules 30 and 34," whereas former Rule 28(h) also referred to Rule 31. Because the matter addressed by Rule 31(a)(1) — the time to serve and file briefs — is now addressed directly in new Rule 28.1(f), the cross-reference to Rule 31 is no longer necessary.

Subdivision (c). Subdivision (c) provides for the filing of four briefs in a case involving a cross-appeal. This reflects the practice of every circuit except the Seventh. *See* 7th Cir. R. 28(d)(1)(a).

> The first brief is the "appellant's principal brief." That brief — like the appellant's principal brief in a case that does not involve a cross-appeal — must comply with Rule 28(a).
>
> The second brief is the "appellee's principal and response brief." Because this brief serves as the appellee's principal brief on the merits of the cross-appeal, as well as the appellee's response brief on the merits of the appeal, it must also comply with Rule 28(a), with the limited exceptions noted in the text of the rule.
>
> The third brief is the "appellant's response and reply brief." Like a response brief in a case that does not involve a cross-appeal — that is, a response brief that does not also serve as a principal brief on the merits of a cross-appeal — the appellant's response and reply brief must comply with Rule 28(a)(2)-(9) and (11), with the exceptions noted in the text of the rule. *See* Rule 28(b). The one difference between the appellant's response and reply brief, on the one hand, and a response brief filed in a case that does not involve a cross-appeal, on the other, is that the latter

must include a corporate disclosure statement. *See* Rule 28(a)(1) and (b). An appellant filing a response and reply brief in a case involving a cross-appeal has already filed a corporate disclosure statement with its principal brief on the merits of the appeal.

The fourth brief is the "appellee's reply brief." Like a reply brief in a case that does not involve a cross-appeal, it must comply with Rule 28(c), which essentially restates the requirements of Rule 28(a)(2)–(3) and (11). (Rather than restating the requirements of Rule 28(a)(2)-(3) and (11), as Rule 28(c) does, Rule 28.1(c)(4) includes a direct cross-reference.) The appellee's reply brief must also be limited to the issues presented by the cross-appeal.

Subdivision (d). Subdivision (d) specifies the colors of the covers on briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(2), which does not specifically refer to cross-appeals.

Subdivision (e). Subdivision (e) sets forth limits on the length of the briefs filed in a case involving a cross-appeal. It is patterned after Rule 32(a)(7), which does not specifically refer to cross-appeals. Subdivision (e) permits the appellee's principal and response brief to be longer than a typical principal brief on the merits because this brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. Likewise, subdivision (e) permits the appellant's response and reply brief to be longer than a typical reply brief because this brief serves not only as the reply brief in the appeal, but also as the response brief in the cross-appeal.

Subdivision (f). Subdivision (f) provides deadlines for serving and filing briefs in a cross-appeal. It is patterned after Rule 31(a)(1), which does not specifically refer to cross-appeals.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * * * *

(7) **Length.**

* * * * *

(C) **Certificate of Compliance.**

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

* * * * *

Committee Note

Subdivision (a)(7)(C). Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume limitations that apply to such briefs, and Rule 28.1(e)(3) requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

Rule 34. Oral Argument

* * * * *

(d) Cross-Appeals and Separate Appeals. If there is a cross-appeal, Rule ~~28(h)~~ 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

* * * * *

Committee Note

Subdivision (d). A cross-reference in subdivision (d) has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

The Reporter said that the Style Subcommittee had made three recommendations, which were described in the Reporter's memorandum to the Committee. The Reporter recommended that the Committee accept these suggestions. By consensus, the Committee agreed.

The Reporter also said that the Department of Justice had made three recommendations, and deferred to Mr. Letter for an explanation. Mr. Letter explained that the Department recommended that Rule 28.1 be amended in the following respects: (1) Add a sentence to the Committee Note to Rule 28.1(b) to clarify that the terms "appellant" (and "appellee") as used by rules other than Rules 28.1, 30, and 34, refer to both the appellant in an appeal and the cross-appellant in a cross-appeal (and to both the appellee in an appeal and the cross-appellee in a cross-appeal). (2) Amending Rule 28.1(d) to prescribe cover colors for supplemental briefs and briefs filed by an intervenor or amicus curiae. (3) Modify the Committee Note to Rule 28.1(e) to clarify the length of an amicus curiae's brief. The Reporter recommended that the Committee accept these suggestions. By consensus, the Committee agreed.

Finally, the Reporter said that no commentator — save one — objected to any aspect of the proposed amendments except the word limits. For the most part, judges argued that the word limits should be reduced (to 14,000, 14,000, 7,000, and 7,000), while practitioners argued that the word limits should be increased (to as much as 14,000, 28,000, 21,000, and 7,000). The

Reporter said that, while he sympathized with the arguments of the judges, he thought that, no matter what word limit was chosen, the proposed amendments should be approved.

The Committee discussed the word limits. Although some support was expressed for the proposal that the word limits be decreased to 14,000, 14,000, 7,000, and 7,000, the consensus of the Committee was that the rule should be approved as published — that is, with word limits of 14,000, 16,500, 14,000, and 7,000. Committee members recognized that the almost universal circuit practice is to limit the second brief to 14,000 words, but argued that a longer word limit is appropriate in light of the fact that the second brief serves not only as the principal brief on the merits of the cross-appeal, but also as the response brief on the merits of the appeal. At the same time, Committee members did not believe that expanding the size of the second brief beyond 16,500 words was appropriate, in light of the fact that the issues raised on a cross-appeal are usually not as many or as complex as the issues raised on appeal — and the fact that the appellee can always ask for additional words if necessary. Although Committee members thus regarded the published word limits as appropriate, they also concurred that disagreement over the word limits should not be allowed to endanger approval of the package of rules.

A member moved that the cross-appeals package of amendments be approved as published, except that the changes suggested by the Style Subcommittee and Department of Justice be made. The motion was seconded. The motion carried (unanimously).

6. Rule 35(a) (disqualified judges/en banc rehearing) [Item No. 00-11]

The Reporter introduced the following proposed amendment and Committee Note:

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

* * * * *

Committee Note

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the en banc procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, a majority of the courts of appeals follow the "absolute majority" approach. Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8-9 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

A substantial minority of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The Third Circuit alone qualifies the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to participate in the case.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of the phrase "a majority of the circuit judges . . . who are in regular active service" in § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

Both the absolute majority approach and the case majority approach are reasonable interpretations of § 46(c), but the absolute majority approach has at least two major disadvantages. First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc. Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). For these reasons, Rule 35(a) has been amended to adopt the case majority approach.

The Reporter recommended that the amendment be approved as published. He said that none of those who opposed the amendment had addressed the fact that Congress (in enacting § 46(c)) and the Supreme Court (in approving Rule 35(a)) have already decided to impose a uniform standard. It is highly unlikely that either Congress or the Court intended that "majority"

mean one thing in half of the circuits and another thing in the other half. The Reporter said, however, that he did recommend that three changes be made to the Committee Note:

First, he recommends that the Note put more emphasis on the fact that the case majority rule is the best interpretation of § 46(c). One of the strongest arguments in favor of the amendment is that the existence of § 46(c) means that there should be a consistent national practice. In addition, Standing Committee members have argued that, in deciding what approach to adopt, this Committee should choose the approach that represents the best interpretation of § 46(c), whether or not that approach is the one that the Committee would choose as an original matter.

Second, he recommends that the Committee accommodate the request of one commentator that language be added to the Note to clarify that nothing in the proposed amendment is intended to foreclose courts from interpreting 28 U.S.C. § 46(d)[2] to provide that a case cannot be heard or reheard en banc unless a majority of all judges in regular active service — disqualified or not — are eligible to participate.

Finally, he recommends that a couple of arguments made by commentators who favored the amendment to Rule 35(a) be incorporated into the Note.

The Reporter presented the following revised draft of the Committee Note:

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion

---

[2]Section 46(d) provides: "A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum."

in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, seven of the courts of appeals follow the "absolute majority" approach. *See* Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

Six of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en banc. (The First and Third Circuits explicitly qualify the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to vote.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

The case majority approach represents the better interpretation of the phrase "the circuit judges . . . in regular active service" in the first sentence of § 46(c). The second sentence of § 46(c) — which defines which judges are eligible to participate in a case being heard or reheard en banc — uses the similar expression "all circuit judges in regular active service." It is clear that "all circuit

judges in regular active service" in the second sentence does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc. Therefore, assuming that two nearly identical phrases appearing in adjacent sentences in a statute should be interpreted the same way, the best reading of "the circuit judges . . . in regular active service" in the first sentence of § 46(c) is that it, too, does not include disqualified judges.

This interpretation of § 46(c) is bolstered by the fact that the case majority approach has at least two major advantages over the absolute majority approach:

First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. This defeats the purpose of recusal. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc.

Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., concerning the denial of reh'g en banc), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). Even though the en banc court may, in a future case, be able to correct an erroneous legal interpretation, the en banc court will never be able to correct the injustice inflicted by the panel on the parties to the case. Morever, it may take many years before sufficient non-disqualified judges can be mustered to overturn the panel's erroneous legal interpretation. In the meantime, the lower courts of the circuit must apply — and the citizens of the circuit must conform their behavior to — an interpretation of the law that almost all of the circuit's active judges believe is incorrect.

The amendment to Rule 35(a) is not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d). In particular, the amendment is not intended to foreclose the possibility that § 46(d) might be read to require that more than half of the number of circuit judges in regular active service be eligible to participate in order for the court to hear or rehear a case en banc.

A Committee member said that, although he had not decided how to vote, he is troubled by two things. First, he is concerned that *Shenker v. Baltimore & Ohio R.R. Co.* could be read to

hold that § 46(c) gives courts precisely the discretion that the amendment to Rule 35(a) seeks to take away. Second, he views both the absolute majority and case majority approaches as reasonable interpretations of § 46(c). Both present a "worst case" scenario, and neither of the two worst case scenarios is obviously worse than the other. Why not allow each circuit to chose which worst case scenario it wants to risk?

A member responded that, as to the first point, he has read *Shenker* several times, and he does not believe that the Supreme Court held that the word "majority" in § 46(c) should mean different things in different circuits. The Reporter agreed; he said that he reads *Shenker* primarily as a private right of action case, holding that § 46(c) does not confer any rights upon litigants. Although the case contains broad dicta about courts having flexibility in setting up internal processes for considering rehearing requests, the case does not go so far as to hold that the threshold standard that must be met — a "majority" of judges — can be interpreted by circuits as they see fit.

A member agreed. He thinks that the status quo — in which "majority" means one thing in half of the circuits and another thing in the other half — is indefensible. He also pointed out that this is not a case in which the Committee is acting pursuant to its general policy of promoting uniformity in federal appellate practice and thereby reducing the burdens on attorneys who practice in more than one circuit. Rather, here Congress imposed uniformity, and the Committee is implementing Congress's decision.

A member said that he agreed that uniformity was the overriding objective. In fact, he said, he did not care whether Rule 35(a) was amended to adopt the absolute majority approach or the case majority approach; he cared only that parties were treated consistently in all federal appellate circuits. Other members disagreed in part. They expressed opposition to the absolute majority approach on the grounds that it counts each recusal as a vote against rehearing.

A member expressed his strong support for the amendment to Rule 35(a). He said that none of the commentators had suggested any reason why local conditions of the circuits justify inconsistent practices. He also said that Rule 35(a) should be amended through the Rules Enabling Act process before a disgruntled litigant contacts a member of Congress and Congress starts rewriting § 46(c).

A member noted the concern expressed by some of the commentators that adoption of the case majority rule would result in too many en banc proceedings. He said that he doubted that the change from the absolute majority approach to the case majority approach would make much of a real-world difference; at most, it might result in one additional en banc proceeding every few years. Moreover, if a circuit's judges do not want too many en banc proceedings, they can simply decline to vote to hear cases en banc.

A member moved that the proposed amendment to Rule 35(a) be approved, with the changes to the Committee Note recommended by the Reporter. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

A. Item No. 00-07 (FRAP 4 — time for Hyde Amendment appeals)

Judge Alito invited Mr. Letter to introduce this item.

Mr. Letter reminded the Committee that this item arose out of a suggestion by Judge Stanwood R. Duval, Jr., that Rule 4 be amended to resolve a circuit split over whether appeals of orders granting or denying applications for attorney's fees under the Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, reprinted in 18 U.S.C. § 3006A (historical and statutory notes)) are governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). In the course of the first Committee discussion of Judge Duval's proposal, several members pointed out that the circuit split over the Hyde Amendment closely resembled the circuit split over whether appeals of orders granting or denying applications for a writ of error *coram nobis* were "civil" or "criminal" — a circuit split that was resolved by the amendment of Rule 4(a)(1) in 2002. The Department of Justice agreed to study the general question of whether Rule 4 should be amended to make it unnecessary or at least easier to distinguish "civil" appeals from "criminal" appeals.

Over the past three years, the Committee had suggested, and the Department had studied, a number of possible approaches. The latest such suggestion was that Rule 4 be amended to provide, in essence, that the time limitations of Rule 4(b) apply to direct appeals of criminal convictions, and the time limitations of Rule 4(a) apply to all other appeals. For example, Rule 4 could be amended to provide something like the following: "As used in this rule, 'appeal in a civil case' means every appeal except a direct appeal from a judgment of conviction entered under Fed. R. Crim. P. 32(k)."

Mr. Letter reported that the Department opposed this latest proposal. The Department identified a number of appeals in criminal proceedings — including appeals brought by defendants, appeals brought by the government, and even appeals brought by uncharged individuals — that must now be filed within a relatively brief period of time (usually 10 days, sometimes more). The proposal would apply a 60-day deadline to these appeals and thus inject considerable delay into criminal proceedings. Such delay could be avoided only if the Committee included a "laundry list" of exceptions to the basic principle, but the Committee has already determined that such a laundry-list approach would not represent much of an improvement over current law.

Mr. Letter also stressed that the circuit split over the Hyde Amendment appears to be the only existing split over whether a particular type of appeal is "civil" or "criminal" for purposes of Rule 4. That single circuit split does not justify a fundamental reworking of Rule 4 — a reworking that could cause unanticipated problems, given Rule 4's importance.

After a brief discussion, members quickly reached consensus that, despite the best efforts of the Committee and the Department, a workable solution to the problem of distinguishing "civil" from "criminal" appeals appears to be out of reach.

A member moved that Item No. 00-07 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

B. Item No. 03-06 (FRAP 3 — defining parties)

Judge Alito invited Mr. Letter to introduce this item.

The Department of Justice has proposed an amendment to Rule 3. Under the amendment, all parties to a case before a district court would be deemed parties to the case on appeal, and all parties to the case on appeal — save those who actually file a notice of appeal — would be deemed appellees. Parties who had no interest in the outcome of the appeal could "opt out" of the case by filing a notice of withdrawal with the clerk.

The Committee discussed the proposed amendment at both its May 2003 and November 2003 meetings. At the November 2003 meeting, the Committee asked the Department and Ms. Waldron to study the possibility of amending the Appellate Rules to implement an "opt-in" system, such as that used by the Third Circuit. Under such a system, all parties to the district court action are initially presumed to be parties to the appeal. However, those who are interested in *remaining* parties must file a notice of appearance. Those who do not are dropped from the appeal.

Mr. Letter reported that, after giving the matter considerable thought, the Department believed that the opt-out system that it had proposed was preferable to the opt-in system used by the Third Circuit. The Department had a number of concerns about an opt-in system. For example, what would happen if parties were given 10 days to opt in, and a party did not receive notice of the appeal or the notice was delayed? This is a real concern for the Department, as its mail is routinely delayed for several days so that it can be irradiated. The Department believes that its proposal would create less confusion and less work for the clerks.

Ms. Waldron said that the appellate clerks disagree. The consensus among appellate clerks is that the status quo works fine. In most circuits, the clerks' offices determine who are parties to the appeal and whether each party is an appellant or appellee by examining the district court docket, the notice of appeal, the order being appealed, and the rest of the record. The clerks

rarely have difficulty figuring out who is a party or whether a party is an appellant or appellee. On the rare occasions when a question arises, it is easily dealt with by the court and the parties. Whatever problems exist are not serious enough to justify the major change in appellate practice — and the major new burdens on clerks and parties — that would be imposed by the adoption of either an opt-in or opt-out system.

The Committee debated the three options: maintaining the status quo, adopting an opt-out system such as that proposed by the Department, or adopting an opt-in system such as that used by the Third Circuit. Committee members identified the potential costs and benefits of each option. In the end, all Committee members, save one, spoke in favor of maintaining the status quo. Members cited the following reasons, among others:

First, the problem addressed by the Department's proposal does not appear to be serious. There is rarely any doubt about whether someone is a party to an appeal or about whether a party is an appellant or appellee. In the rare cases in which there is doubt, the parties can easily ask the court for clarification.

Second, the Department's proposal would burden the clerks and the parties. Few parties are likely to take the trouble to opt out of a case — even a case in which they have little interest. Rather, parties are likely to remain in the appeal so that they can receive the briefs and other papers and keep an eye on the case. As a result, there will be cases in which hundreds of parties in the district court will be deemed parties in the court of appeals — and every one of those hundreds of parties will have to be served with briefs and other papers — even though very few of those parties will have a real stake in the appeal.

Third, the Department's proposal would increase the number of conflicts of interest faced by attorneys and the number of recusals faced by judges. At present, when an appellate attorney decides whether she has a conflict, or an appellate judge decides whether she must disqualify herself, the attorney or the judge takes into account only the "real" parties to the appeal, not all of those who were parties in the district court. By defining all parties to the district court action as parties to the appeal — including those (potentially numbering in the hundreds) who have no plans to actively participate in the appeal but who do not bother to opt out — the Department's proposal would complicate conflict-of-interest and recusal determinations.

Mr. Letter defended the Department's proposal. He argued that the problem is serious enough to merit an amendment to the Appellate Rules; questions regularly arise about who is a party or whether a party is an appellant or appellee. Furthermore, the Department's proposal should actually ease the burden on the clerks. Under the current system, they must examine the district court docket, notice of appeal, order being appealed, and rest of the record and make an educated guess about the configuration of parties on appeal. Under the Department's proposal, all of that work would be done for them by the rule. Finally, the conflict-of-interest and recusal issues raised by Committee members argue in favor of a rule that leaves no doubt about the

parties to the appeal. Perhaps an opt-in system would be preferable to an opt-out system, but either system would provide clearer guidance to attorneys and judges than the status quo.

A member moved that the Department's proposal be approved. The motion failed for lack of a second.

A member moved that Item No. 03-06 be removed from the Committee's study agenda. The motion was seconded. The motion carried (6-1).

C. Item No. 03-08 (FRAP 4(c)(1) — mandate simultaneous affidavit)

Judge Alito invited Mr. Letter to introduce this item.

Prof. Philip A. Pucillo, Assistant Professor of Law at Ave Maria School of Law, has directed the Committee's attention to inconsistencies in the way that the "prison mailbox rule" of Rule 4(c)(1) is applied by the circuits. Under the prison mailbox rule, a paper is considered timely filed if it is deposited by an inmate in his prison's internal mail system on or before the last day for filing. The rule provides that "[t]imely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid."

The circuits disagree about what should happen when a dispute arises over whether a paper was timely filed and the inmate has not filed the affidavit described in the rule. Some circuits dismiss such cases outright, holding that the appellate court lacks jurisdiction in the absence of evidence of timely filing. Other circuits remand to the district court and order the district court to take evidence on the issue of whether the filing was timely. And still other circuits essentially do their own factfinding — holding, for example, that a postmark on an envelope received by a clerk's office is sufficient evidence of timely filing. Prof. Pucillo has proposed that Rule 4(c)(1) be amended to clarify this issue.

The Committee briefly discussed this suggestion at its November 2003 meeting. The Committee tabled further discussion to give Mr. Letter an opportunity to ask the U.S. Attorneys about their experience with this issue and get some sense of whether and how federal prosecutors believe that Rule 4(c)(1) should be amended.

Mr. Letter reported that the U.S. Attorneys have not found that this issue is a problem. In general, when a question arises about the timeliness of a filing by a prisoner, U.S. Attorneys find it easier to respond to the prisoner's filing on the merits than to engage in litigation over timeliness. The Department does not believe that Rule 4(c)(1) needs to be amended.

A member said that he did not think that the problem identified by Prof. Pucillo was serious enough to warrant amending Rule 4(c)(1). Other members agreed.

A member moved that Item No. 03-08 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

D. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) — U.S. officer sued in individual capacity)

Judge Alito invited Mr. Letter to introduce this item.

Under Rule 4(a)(1)(B), the 30-day deadline to bring an appeal in a civil case is extended to 60 days "[w]hen the United States or its officer or agency is a party." Similarly, under Rule 40(a)(1), the 14-day deadline to petition for panel rehearing is extended to 45 days in a civil case in which "the United States or its officer or agency is a party." (By virtue of Rule 35(c), the extended deadline of Rule 40(a)(1) also applies to petitions for rehearing en banc).

Mr. Letter said that it is unclear whether the extended deadlines provided in Rule 4(a)(1)(B) and Rule 40(a)(1) apply when an officer or employee of the United States is sued in her *individual* capacity. Mr. Letter said that this ambiguity does not exist in the Civil Rules. Civil Rule 12(a)(3)(A) extends the deadline for responding to a summons and complaint from 20 to 60 days for "[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity," and Civil Rule 12(a)(3)(B) goes on specifically to provide that:

> An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint . . . within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

At its November 2003 meeting, the Committee considered a proposal by the Department that Appellate Rule 4(a)(1)(B) and Appellate Rule 40(a)(1) be amended so that the Appellate Rules are as clear as the Civil Rules about the deadlines that apply when an officer or employee of the United States is sued in an individual capacity. Although no Committee member objected to the substance of the proposal, Committee members did point out that the proposed amendments drafted by the Department were too broad. Read literally, those amendments would have provided extensions in *any* case in which an officer or employee of the United States was sued, even if the case had nothing to do with the officer's or employee's performance of duties on behalf of the United States. The Department agreed to redraft the proposed amendments.

Mr. Letter said that the Department had redrafted the proposed amendments to Rule 4(a)(1)(B) and Rule 40(a)(1) so that they now provide extensions only 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 duties on behalf of the United States." (The full text of

the amendments, as well as draft Committee Notes, appear in the Committee's agenda book under Tab V-D.) Committee members agreed that the Department's changes met the Committee's concerns.

A member moved that the amendments to Rule 4(a)(1)(B) and Rule 40(a)(1) be approved for publication. The motion was seconded. The motion carried (unanimously).

The Reporter agreed that he would review the draft amendments and Committee Notes and present "cleaned up" versions for the Committee to consider at its fall 2004 meeting.

E. Items Awaiting Initial Discussion

1. Item No. 03-10 (new FRAP 25.1 — privacy protections)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that Section 205 of the E-Government Act of 2002 requires every federal court to maintain a website and to make specific information available through that website. The Act specifically provides that "each court shall make any document that is filed electronically publicly available online" (§ 205(c)(1)), and the Act authorizes a court to "convert any document that is filed in paper form to electronic form" (§ 205(c)(1)). Any document that is so converted must "be made available online" (§ 205(c)(1)). The Act thus establishes broad access to documents that are filed in or converted to electronic form.

The Act also recognizes that such broad access raises important privacy concerns. To address those concerns, the Act directs that the Rules Enabling Act process be used to "prescribe rules . . . to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically" (§ 205(c)(3)(A)(i)). This Committee and the other advisory committees have been charged with implementing rules to "provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts" (§ 205(c)(3)(A)(ii)).

To coordinate the response to this directive, the Standing Committee has appointed an E-Government Subcommittee. That Subcommittee met in January 2004 and agreed upon a plan for developing the privacy rules mandated by the E-Government Act. Pursuant to that plan, each reporter has prepared a draft privacy rule for his advisory committee, based upon a common template. Each reporter will collect the comments of his advisory committee, and the chairs and reporters will meet in June to compare notes and to attempt to agree upon common language that can be presented to all of the advisory committees in the fall.

The Reporter presented the following draft of a new Rule 25.1 for this Committee to consider:

Rule 25.1 Privacy in Court Filings

(a) **Limits on Disclosing Personal Identifiers.** If a party includes any of the following personal identifiers in an electronic or paper filing, the party is limited to disclosing:

(1) only the last four digits of a person's social-security number;

(2) only the initials of a minor child's name;

(3) only the year of a person's date of birth;

(4) only the last four digits of a financial-account number; and

(5) only the city and state of a home address.

(b) **Exception for a Filing Under Seal.** A party may include complete personal identifiers in a filing if it is made under seal. But the court may require the party to file a redacted copy for the public file.

(c) **Social-Security Appeals; Access to Electronic Files.** In an appeal involving the right to benefits under the Social Security Act, access to an electronic file is authorized as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record; and

(2) a person who is not a party or a party's attorney may have remote electronic access to:

(A) the docket maintained under Rule 45(b)(1); and

(B) an opinion, order, judgment, or other written disposition, but not any other part of the case file or the administrative record.

Committee Note

This rule is adopted in compliance with § 205(c)(3) of the E-Government Act of 2002 (Public Law 107-347). Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." This rule goes further than the E-Government Act in protecting personal identifiers, as this rule applies to paper as well as electronic filings. Paper filings in many districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore they raise the same privacy and security concerns when filed with the court.

This rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy provides that — with the exception of Social Security appeals — documents in civil case files should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file. Because case files are available over the internet through PACER, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings and by altogether prohibiting electronic access to the files in Social Security cases by members of the general public. (Social Security appeals are unique in their great number, their extensive records, and their focus on medical records and other intensely private information.)

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not otherwise protected will be made available over the internet through PACER. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from § 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

The Reporter told the Committee that the draft Committee Note was copied from the Committee Note that accompanied the template rule. Because both the Style Subcommittee and the Reporter had made substantial changes to the template rule, the template Committee Note does not match up well with the draft Appellate Rule. The Reporter suggested that the Committee not concern itself with the Note, as the Note will have to be rewritten once the advisory committees agree upon how the privacy rules should be drafted. The Reporter invited the Committee to comment on the proposed rule.

In the discussion that followed, Committee members raised a number of concerns about draft Rule 25.1:

1. The rule is underinclusive in exempting only Social Security appeals from electronic access. Many categories of cases — including immigration cases, Black Lung cases, medical malpractice cases, employment cases, and bankruptcy cases — differ little from Social Security cases in the sensitivity of the information contained in their records. Why are Social Security cases exempt from electronic access but not, say, Black Lung cases?

2. The rule imposes an onerous burden on parties — and particularly on the federal government. Subdivision (a) of the rule requires personal identifiers to be redacted from every "filing" whether or not that "filing" is made on paper or electronically. Assuming that "filing" means everything filed in a case — including appendices and administrative records — parties often will have to review and redact thousands of pages of documents. The government does not have the resources to, for example, redact every personal identifier on every piece of paper filed in every immigration case.

3. The rule will pose difficulty in cases in which a personal identifier is central to the case. For example, in forfeiture cases or cases in which the sufficiency of a warrant is at issue,

the parties may need to refer repeatedly to a personal identifier. How will this litigation be conducted under Rule 25.1?

4. The rule may need to be amended to provide both an "opt-in" procedure — that is, a procedure under which a party (e.g., a plaintiff in a medical malpractice case) can ask that her case be treated with a high degree of privacy — and an "opt-out" procedure — that is, a procedure under which a party (e.g., the government in a forfeiture case) can ask that the privacy rules not apply at all to a case.

5. The title of the rule is misleading in referring to "Privacy in Court Filings." It implies that the rule protects the privacy of the paper files at the courthouse. In fact, the rule does nothing to limit access to such files. The rule or Note should make that clear.

6. The rule (or at least the Note) needs to explain more clearly that, even when electronic access to a record is forbidden (such as in Social Security cases), "non-electronic" access to the record is still permitted. In other words, unless the record is sealed, it will still be available to the public and the media at the courthouse, even if electronic access to the record is forbidden.

7. A member warned that the media are likely to raise strong objections to both the provision requiring that personal identifiers be redacted and the provision exempting Social Security files from electronic access.

8. Finally, a member suggested that Rule 25.1(c)(2) would be clearer if the word "only" was inserted after "electronic access," so that the rule would read: "a person who is not a party or a party's attorney may have remote electronic access *only* to."

Judge Alito thanked the Committee members for their comments and said that the Reporter and he would convey them to the other advisory committee chairs and reporters in June.

VI. Additional Old Business and New Business

The Committee addressed one item of old business:

The Reporter reminded the Committee that both the Civil Rules Committee and the Appellate Rules Committee have been working on amendments that would clarify how the 3-day extension provided by Civil Rule 6(e) and Appellate Rule 26(c) should be calculated. The Civil Rules Committee has been taking the lead; in August 2003, it published for comment a proposed amendment to Rule 6(e). Under that amendment, a party who is required or permitted to act within a prescribed period would first calculate that period, without reference to the 3-day extension provided by Rule 6(e), but with reference to the other time computation provisions of the Civil Rules. After the party has identified the date on which the prescribed period would expire but for the operation of Rule 6(e), the party would add 3 days. The party would have to

act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party would have to act by the next day that is not a Saturday, Sunday, or legal holiday.

At its November 2003 meeting, the Appellate Rules Committee approved for publication a proposed amendment to Appellate Rule 26(c) that would follow the approach of the proposed Civil Rule. A complication has arisen, though. Some of the commentators on the proposed amendment to Civil Rule 6(e) complained that it gives parties too much time, and suggested that time be calculated differently. In particular, commentators suggested that a party should have to count the prescribed number of days and then, even if the last of those days falls on a Saturday, Sunday, or legal holiday, immediately count the three extra days. The paper would be due on the third extra day, unless that day fell on a Saturday, Sunday, or legal holiday.

Prof. Edward Cooper, the Reporter to the Civil Rules Committee, drafted an alternative amendment to Rule 6(e) that would implement the approach urged by the commentators. That amendment was distributed via e-mail to members of the Appellate Rules Committee. The Civil Rules Committee has informed Judge Alito that, before it considers the alternative amendment, it would like to get the input of the Appellate Rules Committee. Judge Alito invited reactions to the alternative.

The Committee quickly reached consensus that the alternative draft was inferior to the original draft for three reasons:

First, the alternative draft is not as clear as the original draft. In drafting time-counting rules, clarity is the most important goal. An extra day or two of delay is an acceptable price to pay for clarity. The alternative draft is difficult to understand. Without the Committee Note, it would be almost impossible to understand.

Second, the alternative draft is not as forgiving as the original draft. The original draft adds the three days in the most generous manner; mistakes are likely to result in papers being filed earlier than necessary. The alternative draft does not add three days in the most generous manner; mistakes could result in blown deadlines.

Third, in some circumstances, the alternative draft would render the three-day extension meaningless. Consider the situation in which the last "prescribed day" is a Saturday, and Monday is a legal holiday. Without the extension, the paper would be due on Tuesday. With the extension, the paper would be due on Tuesday. What's the point of the extension? (And, if Monday is not a legal holiday, the three-day extension provides only one extra day, rendering it almost meaningless.)

Judge Alito asked the Reporter to communicate the Committee's views to the Civil Rules Committee.

Mr. Letter asked to raise one item of new business. He said that the Department of Justice was considering proposing that the Appellate Rules be amended to permit parties to use both sides of the page in submitting briefs and other papers. Such a practice would save paper and file space. The agenda books of the advisory committees are printed on both sides of the page; why couldn't the same practice be followed by the courts of appeals?

One member said that a similar proposal was floated a few years ago, and the circuit judges were violently opposed. Many of them use the blank sides of the pages to make notes, and others use highlighting or other marking that bleeds through the page. She advised the Committee not to stir up this hornet's nest again. Other members of the Committee concurred.

VII. Dates and Location of Fall 2004 Meeting

Judge Alito asked the Committee to hold November 9 and 10 for the fall meeting. It is likely that the Committee will need to meet only on November 9, but Judge Alito asked the Committee also to hold November 10 for the time being. Judge Alito said that the location of the meeting will be announced after the AO has an opportunity to explore some of the suggestions made by Committee members.

VIII. Adjournment

The Committee adjourned at 12:30 p.m.

Respectfully submitted,

Patrick J. Schiltz
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — May 2004

FRAP Item	Proposal	Source	Current Status
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Bankruptcy Rules Committee
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01 Draft approved 04/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved by Advisory Committee 04/04
00-08	Amend FRAP 4(a)(6) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04

FRAP Item	Proposal	Source	Current Status
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting report from Federal Judicial Center Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved with changes by Advisory Committee 04/04
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02 Draft approved 11/03 for submission to Standing Committee

FRAP Item	Proposal	Source	Current Status
02-01	Amend FRAP 27(d) to apply typeface and type-style limits of FRAP 32(a)(5)&(6) to motions.	Charles R. Fulbruge III (CA5 Clerk)	Awaiting initial discussion Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03 Published for comment 08/03 Approved by Advisory Committee 04/04
02-16	Amend FRAP 28 to eliminate local rule variations regarding contents of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice Discussed and retained on agenda 11/03; referred to Federal Judicial Center for study
02-17	Amend FRAP 32 to eliminate local rule variations regarding contents of covers of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice Discussed and retained on agenda 11/03; referred to Federal Judicial Center for study
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 05/03 Draft approved 11/03 for submission to Standing Committee
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Draft approved 04/04 for submission to Standing Committee
03-10	Add new FRAP 25.1 to "protect privacy and security concerns relating to electronic filing of documents," as directed by E-Gov't Act.	E-Government Subcommittee	Awaiting initial discussion Discussed and retained on agenda 04/04
04-01	Amend FRAP 5(c), 21(d), 27(d)(2), 35(b)(2) & 40(b) to replace page limits with word limits.	Advisory Committee	Awaiting initial discussion

DRAFT

Minutes of Spring 2004 Meeting of
Advisory Committee on Appellate Rules
April 13-14, 2004
Washington, D.C.

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, April 13, 2004, at 4:00 p.m., at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr., Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Judge David F. Levi, Chair of the Standing Committee; Prof. Daniel R. Coquillette, Reporter to the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office ("AO"); and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Prof. Patrick J. Schiltz served as Reporter.

The meeting was called to order immediately following a day-long hearing at which over a dozen witnesses testified regarding the proposed amendments to the Appellate Rules that had been published for comment in August 2003. Judge Alito announced that Judge T.S. Ellis III had left the hearing early and would be unable to attend the Advisory Committee meeting because of a family emergency. Judge Alito also announced that the terms of Prof. Mooney and Mr. McGough would expire prior to the Committee's fall meeting, and he expressed hope that Prof. Mooney and Mr. McGough would attend that meeting so that the Committee could express its appreciation for their years of dedicated service. Judge Alito also congratulated Prof. Mooney on her recent appointment as President of St. Mary's College in Notre Dame, Indiana.

II. Approval of Minutes of November 2003 Meeting

The minutes of the November 2003 meeting were approved.

III. Report on January 2004 Meeting of Standing Committee

The Reporter said that this Advisory Committee did not seek action on any items at the Standing Committee's January 2004 meeting. However, Judge Levi invited Judge Roberts (who attended the meeting in place of Judge Alito) and the Reporter to lead a preliminary discussion

regarding proposed Rule 32.1 (on unpublished opinions) and the proposed amendment to Rule 35(a) (on en banc voting). Because the agenda of the Standing Committee's June 2004 meeting is likely to be more crowded than the agenda of its January 2004 meeting, and because both proposals are quite controversial, Judge Levi thought it advisable to begin the discussion of the proposals at the January 2004 meeting.

The Reporter said that, in the course of an hour-long discussion, several members of the Standing Committee, as well as several of the advisory committee chairs and reporters, spoke in support of new Rule 32.1 and the proposed amendment to Rule 35(a). No one expressed opposition to either proposal.

Judge Roberts said that, in his comments about Rule 32.1, he stressed that the rule and accompanying Committee Note were drafted to take no position on the issue of whether it is lawful for a court to refuse to give binding precedential effect to one of its opinions. With respect to Rule 35(a), Judge Roberts said that he highlighted the fact that the decision whether there should be a uniform standard has already been made by Congress. The Advisory Committee was merely trying to act consistently with Congressional intent in resolving the sharp circuit split over the interpretation of that standard.

IV. Action Items

A. Proposed Amendments Published for Comment in August 2003

1. New Rule 32.1 (citation of unpublished decisions) [Item No. 01-01]

Judge Alito introduced the following proposed rule and Committee Note:

Rule 32.1. Citation of Judicial Dispositions

(a) **Citation Permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of "unpublished" opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of "unpublished" opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as "unpublished." Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of "unpublished" opinions, most agree that an "unpublished" opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

State courts have also issued countless "unpublished" opinions in recent years. And, again, although state courts differ in their treatment of "unpublished" opinions, they generally agree that "unpublished" opinions do not establish precedent that is binding upon the courts of the state (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. *See Symbol Tech., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an "unpublished" opinion or forbid any court

from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed "unpublished" opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an "unpublished" opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of "unpublished" opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

Some circuits have freely permitted the citation of "unpublished" opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1(a) is intended to replace these conflicting practices with one uniform rule.

Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may not place any restriction upon the citation of "unpublished" opinions, unless that restriction is generally imposed upon the citation of all judicial opinions — "published" and "unpublished." Courts are thus prevented from undermining Rule 32.1(a) by imposing restrictions only upon the citation of "unpublished" opinions (such as a rule permitting citation of "unpublished" opinions only when no "published" opinion addresses the same issue or a rule requiring attorneys to provide 30-days notice of their intent to cite an "unpublished" opinion). At the same time, Rule 32.1(a) does not prevent courts from imposing restrictions as to form upon the citation of all

judicial opinions (such as a rule requiring that case names appear in italics or a rule requiring parties to follow The Bluebook in citing judicial opinions).

It is difficult to justify prohibiting or restricting the citation of "unpublished" opinions. Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat "unpublished" opinions differently. It is difficult to justify a system under which the "unpublished" opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the "unpublished" opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinions.

Some have argued that permitting citation of "unpublished" opinions would lead judges to spend more time on them, defeating their purpose. This argument would have great force if Rule 32.1(a) required a court of appeals to treat all of its opinions as precedent that binds all panels of the court and all district courts within the circuit. The process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision. As noted, however, Rule 32.1(a) does not require a court of appeals to treat its "unpublished" opinions as binding precedent. Nor does the rule require a court of appeals to increase the length or formality of any "unpublished" opinions that it issues.

It should also be noted, in response to the concern that permitting citation of "unpublished" opinions will increase the time that judges devote to writing them, that "unpublished" opinions are already widely available to the public, and soon every court of appeals will be required by law to post all of its decisions — including "unpublished" decisions — on its website. *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913. Moreover, "unpublished" opinions are often discussed in the media and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v.*

Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002) (reversing "unpublished" decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing "unpublished" decision of Second Circuit). If this widespread scrutiny does not deprive courts of the benefits of "unpublished" opinions, it is difficult to believe that permitting a court's "unpublished" opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own "unpublished" opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize "unpublished" opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of "unpublished" opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, "unpublished" opinions are as readily available as "published" opinions. Barring citation to "unpublished" opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that citing "unpublished" opinions is "disfavored" or limited to particular circumstances (such as when no "published" opinion adequately addresses an issue). Again, it is difficult to understand why "unpublished" opinions should be subject to restrictions that do not apply to other sources. Moreover, given that citing an "unpublished" opinion is usually tantamount to admitting that no "published" opinion supports a contention, parties already have an incentive not to cite "unpublished" opinions. Not surprisingly, those courts that have liberally permitted the citation of "unpublished" opinions have not been overwhelmed with such citations. Finally, restricting the citation of "unpublished" opinions may spawn satellite litigation over whether a party's citation of a particular "unpublished" opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an "unpublished"