

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure (the "Committee") met on June 14-15, 2010. All members attended. Lisa O. Monaco, Principal Associate Deputy Attorney General, and Karyn Temple Claggett, Senior Counsel to the Deputy Attorney General, attended on behalf of the Department of Justice. Chief Justice Wallace Jefferson of the Texas Supreme Court also attended.

Representing the advisory rules committees were: Judge Jeffrey S. Sutton, chair, and Professor Catherine T. Struve, reporter, of the Advisory Committee on Appellate Rules; Judge Laura Taylor Swain, chair, and Professor S. Elizabeth Gibson, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Mark R. Kravitz, chair, Professor Edward H. Cooper, reporter, and Professor Richard L. Marcus, associate reporter, of the Advisory Committee on Civil Rules; Judge Richard C. Tallman, chair, Professor Sara Sun Beale, reporter, and Professor Nancy J. King, associate reporter, of the Advisory Committee on Criminal Rules; and Judge Robert L. Hinkle, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; Professor R. Joseph Kimble, consultant to the

Committee; John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office; James N. Ishida, Jeffrey N. Barr, and Henry Wigglesworth, attorneys in the Office of Judges Programs in the Administrative Office; Judge Barbara Jacobs Rothstein, Director, and Joe Cecil, Tom Willging, Emery G. Lee, and Tim Reagan of the Federal Judicial Center; and J. Christopher Kohn, Director, Commercial Litigation Branch, Civil, Department of Justice.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 4 and 40 with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed rule changes were circulated to the bench and bar for comment in August 2007. The scheduled public hearings on the proposed rule changes were cancelled because no one asked to testify. The advisory committee also proposed seeking companion legislative amendments to 28 U.S.C. § 2107.

The proposed amendments to Rules 4 and 40 clarify the time to appeal or to seek rehearing in a case in which a United States officer or employee is a party. The proposed amendment to Rule 4(a)(1)(B) makes clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. The amendment is consistent with Civil Rule 12(a)(3), which provides an extended 60-day period to respond to the complaint when a United States officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Civil Rule 12 recognizes that the government requires additional time to determine whether to provide representation to the defendant officer or employee. The same

reasons justify providing additional time to the Solicitor General to decide whether to file an appeal. Because these reasons also apply to a petition for panel rehearing in such cases, the proposed amendment to Rule 40(a)(1) makes clear that the period to file the petition is 45 days. The extended time provides the Solicitor General adequate time to review the merits of the panel decision and decide whether to seek rehearing.

The advisory committee deferred action on the proposed amendments to Rule 4 after the Supreme Court emphasized in *Bowles v. Russell*, 551 U.S. 205 (2007), that statutory appeal time periods are jurisdictional. The advisory committee carefully considered whether, in light of *Bowles*, amending the Rule 4 appeal period would raise a jurisdictional issue because the period is set by 28 U.S.C. § 2107 as well as by rule. The advisory committee concluded that amending § 2107 using language identical to the proposed amendments to Rule 4 would avoid any potential jurisdictional issue raised by *Bowles*. The advisory committee recommended seeking legislation to amend § 2107, coordinated to have the same provisions and to take effect on the same day as the amendments to Rule 4. Although the proposed amendment to Rule 40 does not affect a time period with a statutory counterpart and does not raise any *Bowles* issue, the advisory committee concluded that the two rules proposals should be presented together because they are so closely related.

The proposed amendments to Rules 4 and 40 and the proposed amendments to § 2107 include two “safe harbor” provisions that address concerns about a party relying on the longer period for filing the appeal or the petition for rehearing, only to risk being held untimely by a court that later concludes that the relevant act or omission had not actually occurred in connection with duties performed on the United States’ behalf. The amendments make explicit that the longer periods apply in any case in which the United States either represents the officer

or employee at the time of entry of the relevant judgment or files the notice of appeal or petition on the officer's or employee's behalf. The two safe harbors are not exclusive and other circumstances may qualify for the extended period. For example, the longer period would apply in a case when the United States does not represent the affected employee either when the judgment is entered or when the appeal or petition is filed, but is paying for private counsel for the employee.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

- a. Approve the proposed amendments to Appellate Rules 4 and 40 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.
- b. Seek legislation amending 28 U.S.C. § 2107, consistent with the proposed amendments to Rule 4, to clarify the treatment of the time to appeal in a case in which a United States officer or employee is a party.

The proposed amendments to the Federal Rules of Appellate Procedure and to 28 U.S.C. § 2107 are in Appendix A, with an excerpt from the advisory committee report.

Informational Items

The advisory committee is coordinating with the Advisory Committee on Bankruptcy Rules on a project to revise Part VIII of the Bankruptcy Rules (Appeals to District Court or Bankruptcy Appellate Panel). The advisory committee will hold a joint meeting with the Advisory Committee on Bankruptcy Rules in the spring of 2011 to examine the proposed revisions.

A joint subcommittee of members from the advisory committee and the Advisory Committee on Civil Rules is studying issues of mutual concern, including whether parties can “manufacture finality” necessary to appeal by voluntarily dismissing unresolved peripheral claims when the district court has ruled on the main claims in the case.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 2003, 2019, 3001, 4004, and 6003, new Rules 1004.2 and 3002.1, and proposed revisions to Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C, with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed changes were circulated to the bench and bar for comment in August 2009. Fifteen witnesses appeared at a public hearing conducted on February 5, 2010, in New York. The other scheduled public hearing on the proposed changes was cancelled because the one witness who asked to testify at the hearing agreed to do so by telephone. The advisory committee considered more than 150 written comments on the proposed amendments.

Rule 1004.2

Proposed new Rule 1004.2 requires that a petition for recognition of a foreign proceeding under new chapter 15 of the Bankruptcy Code identify the countries where a foreign proceeding is pending against the same debtor and the country where the debtor has its “center of main interests.” The rule sets out applicable notice provisions and generally requires that a challenge to the debtor’s designation of the center of main interests be raised at least seven days before the hearing on the petition for recognition. The proposed new rule was published in August 2008 and republished with a revision in August 2009. As revised, the deadline to file a motion challenging the debtor’s designation was changed from “60 days after the notice of the petition has been given” to no later than seven days before the petition hearing. No comments were submitted following republication.

Rule 2003(e)

The proposed amendments to Rule 2003(e) require a presiding official who “adjourns” a meeting of creditors to file a statement specifying the date and time to which the meeting is adjourned. The requirement ensures that the record clearly reflects whether the meeting of creditors was concluded or extended to another day. The Committee Note makes clear that an adjournment to a specific date is the equivalent of holding the meeting “open” for purposes of § 1308(b) of the Bankruptcy Code. Under 11 U.S.C. § 1308(a), a chapter 13 debtor is required to file certain tax returns “[n]ot later than the day before the date on which the meeting of creditors is first scheduled to be held.” Under § 1307(e), the debtor’s failure to file the required tax returns is a basis for dismissal or conversion of the chapter 13 case. Section 1308(b), however, provides that if the debtor has not filed the required tax returns by the date on which the meeting of creditors is first scheduled, the trustee may “hold open that meeting for a reasonable period of time” — not to exceed 120 days for a return that is past due as of the date the petition is filed — which gives the debtor additional time to file the required return.

Eight of the nine comments submitted on the proposed amendments expressed support. The Office of Chief Counsel of the IRS recommended revising the proposed amendments to require the official presiding at the meeting of creditors to specify whether the meeting is being “held open” to allow a taxpayer additional time to file a tax return, or whether the meeting is being “adjourned” for some other purpose. The advisory committee concluded that requiring the trustee to make this distinction expressly and on the record in every case would subject chapter 13 cases to conversion or dismissal merely because the trustee failed to make the necessary statement or unintentionally used the wrong words in adjourning a meeting of creditors. Instead, the advisory committee concluded that it would be simpler and less confusing, and would avoid an unnecessary trap for debtors, to treat a meeting that is “adjourned” to a specific date as “held

open” under § 1308(b) and as allowing the debtor additional time to file a tax return. There is no risk that this would create an indefinite extension because the additional time for filing tax returns is limited by statute.

Rule 2019

The proposed amendments to Rule 2019, which applies in chapter 9 and chapter 11 proceedings, expand disclosure requirements to facilitate openness and transparency by revealing potentially divergent economic interests within groups of creditors or equity security holders and on the part of putative representatives of other stakeholders. The proposed amendments require committees, groups, or entities that consist of or represent creditors or equity security holders who are acting in concert to identify their “disclosable economic interests” relating to the debtor. This term is broadly defined in subdivision (a) to include economic rights and interests that are affected by the value, acquisition, or disposition of a claim or interest. The amendments require every such group or committee to provide a verified statement of, among other things, the nature and amount of each disclosable economic interest relating to the debtor. In addition, each member of an unofficial group or committee that claims to represent any entity in addition to the members of the group or committee must disclose the acquisition date of each disclosable interest by quarter and year, unless the interest was acquired more than a year before the bankruptcy petition was filed. Such information is important to evaluate positions taken by these groups and entities. For example, it is important to know that members of a committee purporting to represent the debtor’s bond holders also hold a derivative position the value of which is inverse to that of the bonds.

The overwhelming majority of individuals and groups commenting on the published proposed amendments supported a clarified and reinvigorated Rule 2019. During the public comment period, the advisory committee heard concerns from some distressed-debt investors

about the potential impact of the proposed rule on certain proprietary business information and about the breadth of the proposed rule's enforcement provision. The advisory committee revised the published amendments in several important respects to address these concerns.

As published, the amendments would have required disclosure of the precise date when each disclosable economic interest was acquired (if not more than one year before the filing of the petition) and, if directed by the court, the amount paid for each disclosable economic interest. The proposed disclosure obligations would have applied to each covered entity, indenture trustee, or member of a group or committee, and to each creditor or equity security holder represented by a covered entity, indenture trustee, or committee or group (other than an official committee). During the public comment period, the advisory committee was informed that pricing information is highly guarded by distressed-debt purchasers who fear that its disclosure could give industry participants unfair insight into competitors' trading strategies. Though the published amendments had taken the conservative approach of requiring automatic disclosure only of the acquisition date and insisting on a court order to obtain price information, the advisory committee was persuaded by the public comments that this approach was still too broad. The combination of market volatility and publicly available price data means that requiring disclosure of the date of purchase would as a practical matter reveal the acquisition price, even if the court did not order disclosure. Effectively requiring pricing information disclosed in every case could discourage investors from purchasing distressed debt, which would be counterproductive.

After careful consideration, the advisory committee made several changes to the published rule. The advisory committee eliminated the provision specifically authorizing a court to order the disclosure of the amount paid for a disclosable economic interest. In addition, the acquisition-date disclosure provision was modified to require disclosure only by quarter and year.

The information that was eliminated is not necessary to accomplish the primary purpose of the amendments. As revised, the proposed amendments require the disclosure of enough information to reveal potential conflicts of interest. If more specific information is important in an individual case, disclosure could be obtained through discovery or ordered pursuant to the court's existing authority.

The advisory committee also added language in subdivision (b)(1) limiting the covered groups, committees, and entities to those that represent or consist of multiple creditors or equity security holders acting in concert to advance their common interests. This revision clarifies that groups composed entirely of affiliates or insiders of one another are not subject to Rule 2019's disclosure requirements.

The advisory committee also added a definition of "represent" or "represents" in subdivision (a)(2) that limits the application of the rule to groups, committees, and entities taking a position before the court or soliciting votes on a plan. This revision excludes from the rule those whose involvement in a case is merely passive. The revision addresses concerns expressed during the public comment period that the rule's disclosure requirements should not be triggered when, for example, a law firm represents more than one client with respect to a chapter 11 case but does not appear in court to seek or oppose relief on behalf of more than one of those clients. There is no reason to require an entity that remains passive in the case to publicly disclose its holdings merely because it retained a firm that happens to represent one or more other creditors or equity security holders.

For similar reasons, the advisory committee eliminated the provision in subdivision (b) of the published amendments that authorized a court to require disclosure by an entity that does not represent anyone else. The advisory committee also added subdivision (b)(2), which excludes

certain entities — including indenture trustees and class action representatives — from the rule’s disclosure requirements unless the court orders otherwise.

Finally, the published enforcement provisions that authorized the court to determine failures to comply with legal requirements regulating the activities and personnel of an entity, group, or committee were deleted, limiting the scope of the enforcement provision to failures to comply with the rule itself.

Rule 3001

The proposed amendments to Rule 3001 require creditors to provide additional information supporting certain proofs of claim and impose penalties if creditors fail to comply with the new disclosure requirements. The amendments proposed for Judicial Conference approval were revised after publication to refer to an official form that will be prepared to facilitate reporting certain of the disclosure items. Other revisions limit the amended rule’s sanctions provision. Provisions of the published rule that imposed certain disclosure requirements in connection with claims based on open-end or revolving credit arrangements have been revised more extensively and, as explained below, will be republished in August 2010 for further public comment.

As revised, the proposed amendments presented for Judicial Conference consideration continue and clarify the long-established disclosure requirement that a creditor presenting a claim in an individual-debtor case provide an itemized statement of the interest, fees, expenses, and other charges incurred before the petition was filed. Special disclosure requirements apply under the amendments if the claim is secured by a security interest in the individual debtor’s property. In such a case, a statement of the amount necessary to cure any prepetition default and, for home mortgages, a statement of any escrow account must also be provided.

The proposed amendments, modified after public comment, also strengthen the penalties for failing to comply with the Rule 3001 requirements. The provision published for comment generally mandated sanctions for creditors who failed to provide the required information, including prohibiting the creditor from presenting any of the omitted information as evidence in a contested matter or adversary proceeding in the case, unless the court determined that the failure was substantially justified or harmless. The penalty provision is based on Civil Rule 37, which prohibits a party from using information “to supply evidence on a motion, at a hearing, or at a trial” that it fails to disclose as part of its disclosure obligations. The proposed amendments to the sanctions provision of Rule 3001 are grounded in the courts’ well-recognized authority to control the presentation of evidence used in court proceedings. The sanctions provision, as revised after public comment, continues to permit exclusionary sanctions only if the failure to provide the required information was not “substantially justified or . . . harmless”; further emphasizes the court’s discretion to determine whether that sanction or any other should be imposed; and makes it clear that “notice and hearing” is required before the imposition of any sanction. The Committee Note specifically recognizes that a creditor’s failure to provide the required information under the proposed amendment to Rule 3001(c) is not in itself a ground for disallowance of the claim. The claim can be disallowed only if it comes within one of the grounds for disallowance under § 502(b) of the Bankruptcy Code.

As published in August 2009, the proposed amendments to Rule 3001(c) would have required the holder of a claim based on an open-end or revolving consumer credit agreement to attach to its proof of claim the last account statement sent to the debtor before the commencement of the bankruptcy case. Consumer bankruptcy lawyers, trustees, and judges have long raised concerns about creditors filing bare proofs of claim with little supporting documentation, especially bulk purchasers of credit-card debt. Such bare proofs of claim make it

virtually impossible to ascertain whether the claims are valid. Though such bare proofs of claim raise suspicions, debtors' lawyers have little incentive to expend time and resources to evaluate such claims because they generally receive no compensation for the effort and any money derived from such efforts is paid to other unsecured creditors. The trustees often cannot investigate suspicious proofs of claim because of their workload burdens. As a result, despite the lack of supporting documentation, many invalid claims purchased in bulk are simply not challenged.

During the public comment period, many supported the increased disclosure requirements. Representatives of bulk purchasers of credit card debt, however, strongly objected to the account statement requirement. They asserted that the statement will often not be available when the proof of claim is filed. Under federal record retention policies for financial institutions, credit card account records generally need to be retained for only two years. Furthermore, account information is usually stored in an electronic format, and it may not be practicable to produce a duplicate of an account statement. The advisory committee concluded that if there is a less burdensome way for a creditor to provide the information needed to assess the validity of its claim, the rule should not insist on an exclusive, more costly, means of providing such information. This provision was revised to allow creditors to provide information relevant to determinations of the age, prior holders, and other salient features of the claim in a more convenient fashion. The modified proposed rule also relieves claimants to which it applies from the general requirement of filing the original or duplicate of the writing on which the claim is based. Instead, the proposed rule provides that documentation relating to an open-end or revolving consumer credit claim must be disclosed if a party in interest requests it. Because the revisions were so significant, this proposal will be published in August 2010 for public comment and is not presented to the Judicial Conference at this time.

Rule 3002.1

Proposed new Rule 3002.1 implements § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan. The rule is intended to provide the mortgagor-debtor information necessary to determine the exact amount needed to cure any prepetition arrearage and the amount of the postpetition payments. If the latter amount changes over time because of changing interest rates, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of any change in payment must be conveyed to the debtor and trustee. Numerous consumer bankruptcy lawyers, trustees, and judges have reported that debtors often do not learn until after completing a chapter 13 plan that the mortgage payments have changed. In particular, debtors do not learn that fees, expenses, or other charges have been imposed during the life of the plan. As a result, debtors may face renewed foreclosure proceedings immediately after emerging from bankruptcy. Timely notice of such changes will permit the debtor and trustee to adjust postpetition mortgage payments and, if appropriate, challenge the validity of fees, expenses, or other charges assessed during the bankruptcy.

Under the proposed rule, the holder of a home mortgage claim must give: (1) a notice itemizing any postpetition fees, expenses, or charges within 180 days after they are incurred; and (2) at least 21 days' advance notice to the debtor, debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. To address suggestions for different time periods and concerns about how the time period would apply to loan payments that adjust frequently, the deadline to notify the debtor of any payment changes was revised after the public comment period from thirty to 21 days before the debtor's payment in the new amount is due.

The proposed rule also establishes a procedure for determining whether the debtor has cured any default and is otherwise current on mortgage payments at the close of a chapter 13

case. Finally, the proposed rule provides for sanctions if the holder of a claim secured by the debtor's principal residence fails to provide any of the required information.

Rule 4004

The proposed amendments to Rule 4004 provide that a party may seek an extension of time, based on newly discovered information, to object to a debtor's discharge after the time for objecting expires but before a discharge is granted. In some cases the court does not enter a discharge immediately after the objection deadline passes. A gap period — between the expiration of the time for objecting and the actual entry of a discharge — is created during which a party may discover information that would have provided a basis for objecting had it been known in time to object. When the discharge is later entered, revocation of the discharge under § 727(d) of the Bankruptcy Code may not be available based on information acquired in the gap period, because some grounds for revocation require the complaining party to have learned of the debtor's misconduct after the entry of the discharge. The amendments allow a party in that circumstance to file a motion for extension of time to object to the debtor's discharge even though the objection period has expired.

Rule 6003

The proposed amendments to Rule 6003 clarify that the 21-day waiting period before a court can enter certain orders at the beginning of a case, including an order approving employment of counsel, does not prevent the court from specifying in the order that it is effective as of an earlier date. The amendments recognize the common practice of such nunc pro tunc orders.

Official Forms

The proposed revisions to Official Forms 9A, 9C, and 9I conform those forms to amendments to Rules 4004 and 7001, which are due to take effect on December 1, 2010. The

amended rules provide that certain objections to a debtor's discharge are to be made by motion instead of by a complaint. The existing forms contain a deadline to object by filing a complaint, which is revised consistent with the amended rules. The advisory committee and the Committee approved these changes after the Committee's meeting, when the issue first arose. Because the changes are technical and conforming, no publication for public comment was required.

The proposed revisions to Official Forms 20A and 20B conform to Rule 9037 and to a 2005 amendment of § 727(a)(8) of the Bankruptcy Code, which extended from six to eight years the period during which a debtor is barred from receiving successive discharges. The changes were not published for public comment because they are technical and conforming.

The proposed revisions to Official Forms 22A and 22C make modest changes to reflect more accurately, for purposes of the means test, the manner in which the IRS National and Local Standards are applied by the IRS. The proposed revisions to Official Forms 22A, 22B, and 22C also clarify that only one joint filer should report regular payments by another person for household expenses. The proposed revisions to Official Form 22A also amend the introductory instruction to Part I to reflect the Bankruptcy Code's ambiguities regarding application of means test exemptions in joint cases in which only one debtor is exempt.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

- a. Approve the proposed amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.
- b. Approve the proposed revisions of Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C to take effect on December 1, 2010.

The proposed amendments to the Federal Rules of Bankruptcy Procedure are in Appendix B, with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 3001, 7054, and 7056, proposed revisions of Official Forms 10 and 25A, and a proposed new attachment and supplements to Official Form 10 (Attachment A, Supplement 1, and Supplement 2), with a request that they be published for comment. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Rule 3001

The proposed amendments to Rule 3001 require creditors to provide information supporting proofs of claim when the claim is based on an open-end or revolving consumer credit agreement, including: (1) the name of the entity from whom the creditor purchased the account; (2) the name of the entity to whom the debt was owed at the time of the last transaction on the account by an account holder; (3) the date of the last transaction on the account by an account holder; (4) the date of the last payment on the account; and (5) the date on which the account was charged to profit and loss. The amendments do not require the creditor to report the information in a specific format, such as the last credit card account statement. A party in interest may also obtain the documents on which an open-end or revolving consumer credit claim is based by making a written request to the claim holder.

Rule 7054

The proposed amendments to Rule 7054 extend from one to fourteen days the notice given to a party of costs taxed by the clerk. The existing rule provides for the taxing of costs by the clerk on one day's notice. That period is unrealistically short. The amendment provides

more time to a party to prepare and present a response to a prevailing party's bill of costs. The changes conform to the 2009 amendments to Civil Rule 54(d).

Rule 7056

The proposed amendment to Rule 7056 creates a default deadline for filing a summary judgment motion in a bankruptcy adversary proceeding of 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought. The existing default deadline incorporates the deadline in Civil Rule 56, which is 30 days after the close of discovery. That date is too late in many bankruptcy proceedings. A default deadline based on the scheduled hearing date, rather than the close of discovery, is more appropriate for bankruptcy cases because evidentiary hearings can occur soon after the close of discovery.

Official Forms

The proposed revisions to Official Form 10 (proof of claim form) require more information on the interest rate specified for secured claims, clarify the requirements to attach redacted documents supporting a claim, add a space for a uniform claim identifier, and emphasize the party's duty to submit a true and accurate claim. A new attachment and new supplements to Official Form 10 — Attachment A, Supplement 1, and Supplement 2 — corresponding to the proposed amendments to Rule 3001(c) and new Rule 3002.1, require additional information on claims secured by a debtor's principal residence. The proposed revision of Official Form 25A, a model plan of reorganization for small businesses, changes the effective date provision.

Informational Items

The advisory committee is revising and modernizing the bankruptcy forms. As part of this project, the advisory committee is analyzing the forms, seeking ways to make them easier to use and more effective for their intended purposes, and considering possible approaches to take

advantage of advances in technology. The advisory committee has retained the services of a consultant who is expert in designing forms.

The advisory committee is considering a comprehensive revision of Part VIII of the Bankruptcy Rules, which addresses appeals to district courts and bankruptcy appellate panels, to align Part VIII more closely with the Federal Rules of Appellate Procedure, and to reflect the many consequences of electronic filing. The advisory committee will hold its spring 2011 meeting in conjunction with the Advisory Committee on Appellate Rules so that the two committees can examine the proposed revisions together.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no items for the Committee's action.

Informational Items

During the past decades, the advisory committee has amended the rules to address complaints about undue and rising cost and delay in civil litigation in the federal courts. Despite the amendments, the complaints have persisted, fueled most recently by the advent of electronic discovery. On the other hand, the advisory committee has received information pointing in the opposite direction, including data showing that many cases in federal courts are handled relatively quickly and efficiently. Frustrated with the available empirical data, the advisory committee commissioned more than two dozen empirical studies and surveys from the Federal Judicial Center, major bar organizations, and research institutions to address the seeming contradictory evidence. To evaluate this work, the advisory committee held a Litigation Review Conference on May 10-11, 2010, at the Duke University School of Law. The advisory committee invited more than 70 moderators, panelists, and speakers to attend the Conference to address pleading, electronic and other discovery, summary judgment, and trial issues.

The panel members presented dozens of “white papers” describing litigation problems and suggesting alternative solutions. Approximately 200 participants expressed a wide array of views, indicating consensus on some issues and prompting vigorous discussion of many others. The most reassuring lesson was that no one thought the time has come to abandon the overall system or structure established by the 1938 Civil Rules. Many of the proposals were important, and often controversial in proportion to importance, but all would operate within the range and framework of familiar procedures. The participants discussed possible rule changes, as well as possible changes in statutes and in judicial and legal education. The advisory committee will highlight the major themes of the Conference in a report to the Chief Justice. It expects that the Conference, and the enormous set of empirical studies and thought pieces prepared for it, will set the agenda and inform the work of the advisory committee for years to come.

The advisory committee is considering proposed amendments to Rule 45, which governs discovery and trial subpoenas addressed to a nonparty, to resolve several problems. Specific topics include improved notice to all parties before serving document-production subpoenas, coordination between the court where the action is pending and the court from which the subpoena is issued, and the geographic reach of trial subpoenas. The advisory committee is also considering simplifying Rule 45 without lessening the usefulness of the rule. The advisory committee will hold a mini-conference on October 4, 2010, in Dallas, Texas, where a select group of practitioners, academics, and judges have been invited to share their views on these Rule 45 issues.

The advisory committee is continuing to examine the standards that apply to motions to dismiss for failure to state a claim upon which relief can be granted in light of the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and in light of legislation proposed in the House and Senate to overturn

these decisions. The advisory committee continues to study and monitor the lower courts' application of the Supreme Court decisions, the effect of those decisions on rates of filing of motions to dismiss and rates of grants or denials in different kinds of cases, and the implications of different versions of proposed legislation.

The advisory committee is also continuing to examine Rule 26(c), which addresses protective orders in discovery. Congress continues to express concerns over the role of protective orders. Proposed Sunshine in Litigation Act bills (S. 537, 111th Cong.; H.R. 1508, 111th Cong.) introduced in 2009 would require a judge, before entering a protective order, to make specific findings of fact that the discovery material to be protected by the order does not affect public health or safety. Another similar bill, H.R. 5419, has been introduced in 2010.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 1, 3, 4, 6, 9, 40, 41, 43, and 49, and new Rule 4.1, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench and bar for comment in August 2009. Scheduled public hearings on the amendments were cancelled because no one asked to testify. The advisory committee also submitted, without publication, proposed technical and conforming amendments to Rules 32 and 41, with a recommendation that they be approved and transmitted to the Judicial Conference.

The substantive proposed amendments are designed to accommodate and take advantage of improvements in technology in criminal proceedings. The amendments build on favorable experience with current Rule 41, which provides that a court may issue a search warrant by telephone or other reliable electronic means, and Rules 5 and 10, which provide that a defendant may make an appearance by means of video teleconferencing in certain proceedings.

Under certain circumstances set out in the proposed amendments, a law enforcement officer may transmit information to the court by reliable electronic means, including electronic mail, instead of appearing before a judicial officer to present that information, and an accused may participate in designated proceedings by video teleconferencing in lieu of physically appearing before the court. Allowing expanded use of technology responds to needs that are most acute in districts covering large areas, benefitting both the accused and law enforcement personnel. The amendments are intended to reduce the delays, security risks, burdens, and costs of traveling long distances for proceedings that no longer require physical presence to be fairly and effectively handled. The amendments permit, but do not mandate, the use of these alternative procedures, allowing the judge to determine on a case-by-case basis whether the advantages of electronic transmission outweigh the important interests in requiring the physical presence of an accused or a law enforcement officer before a judge. They also include safeguards that limit how and when these options may be used.

The proposed amendments to Rule 1 expand the definition of “telephone” to include any technology that enables live voice conversations, including cell phone technology and calls over the internet.

The proposed amendments to Rule 3 provide that a court may consider a complaint based on information submitted by reliable electronic means. Together with proposed amended Rules 4 and 9 and new Rule 4.1, the amendments to Rule 3 provide a court with flexibility to handle the submission of a complaint and a request for an arrest warrant when the circumstances make the law enforcement officer’s physical presence before the judge impractical. Under existing law, a law enforcement officer may arrest an accused under exigent circumstances without first obtaining judicial authorization. The ability to handle a warrant request virtually instantaneously by electronic means should facilitate judicial oversight of the arrest decision by

reducing the number of instances when a law enforcement officer must make an arrest without prior judicial authorization.

The proposed amendments to Rule 4 work in conjunction with the proposed amendments to Rule 3 and provide that a court may issue an arrest warrant or summons based on information submitted by reliable electronic means. The proposed amendments also authorize the preparation and use of duplicate original arrest warrants when the original warrant is issued electronically, and authorize the return of warrants by reliable electronic means.

Proposed new Rule 4.1 brings together in a single rule the procedures for using phones or other reliable electronic means to review complaints and apply for and issue warrants and summonses. The procedures governing requests for search warrants “by telephonic or other reliable electronic means” under current Rule 41(d)(3) and (e)(3) have been relocated to this rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses. The recording requirements have also been simplified to address concerns raised, in particular, by magistrate judges who regularly handle such requests.

The proposed amendments to Rule 6 allow the return of an indictment by video teleconference “to avoid unnecessary cost or delay.” Having a judge in the same courtroom as the grand jury when returns are made remains the preferred practice; the video teleconferencing option is expected to be used only sparingly and in limited circumstances. The added flexibility will be especially useful in jurisdictions that cover a large territory where the nearest judge may be hundreds of miles away from where the grand jury is sitting and travel is time-consuming or difficult due to weather or road conditions, preserving the judge’s time and safety while accommodating the Speedy Trial Act’s requirement, 18 U.S.C. § 3161(b), that an indictment be returned within 30 days of arrest.

The proposed amendments to Rule 9 provide that a court may issue an arrest warrant or summons based on information communicated by reliable electronic means on the return of an indictment or the filing of an information. The amendments parallel the proposed amendments to Rule 4, which permit a court to issue an arrest warrant or summons based on information submitted by a law enforcement agent through reliable electronic means.

The proposed amendments to Rule 40 provide that a court may permit a defendant to appear by video teleconference in a proceeding involving an arrest for failing to appear in another district or for violating conditions of release set in another district, but only if the defendant consents. The amendments are intended to facilitate such proceedings, providing a more convenient procedure for both the government and the defendant in certain circumstances. The change mirrors Rule 5, which already permits a judge to allow a consenting defendant to participate in an initial appearance by video teleconference.

The proposed amendments to Rule 41 permit the return of warrants and inventories by reliable electronic means. Those aspects of Rule 41 that currently specify the procedure for securing warrants with information transmitted electronically have been moved to proposed new Rule 4.1.

The proposed amendments to Rule 43 provide that a court may permit a defendant to appear by video teleconference in a misdemeanor or petty offense proceeding. Under the current rule, a defendant may consent not to be physically present during the entirety of a misdemeanor or petty offense proceeding, including trial and sentencing. This is not uncommon in cases in which the alleged offense is minor — such as a traffic violation committed in a national park that the defendant visits while on vacation — and requiring the accused to travel long distances to attend the proceeding is unreasonable. Instead of relinquishing the right to attend the misdemeanor or petty offense proceeding altogether, the proposed amendments offer the judge

the option of permitting the accused to participate in the arraignment, plea, trial, and sentencing by video teleconference. This option is intended to be used in limited circumstances, contingent on the defendant's written consent and the court's discretion.

The proposed amendments to Rule 49 provide that a court may allow, by local rule, papers to be filed, signed, or verified by electronic means that are consistent with the technical standards established by the Judicial Conference. The amendments are based on similar amendments to Civil Rule 5, Appellate Rule 25, and Bankruptcy Rule 7005.

Proposed technical and conforming amendments to Rule 32(d)(2)(F) and (G) reverse two items in a list, moving the "catch-all" provision to the end, and remedy a lack of parallelism within the rule.

Proposed technical and conforming amendments to Rule 41 delete references to "calendar days," which should have been omitted as part of the time-computation amendments that became effective on December 1, 2009, but were inadvertently retained.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Criminal Rules 1, 3, 4, 6, 9, 32, 40, 41, 43, and 49, and new Rule 4.1, and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Criminal Procedure are in Appendix C, with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 5 and 58, and new Rule 37, with a request that they be published for comment. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

The proposed amendments to Rule 5 clarify that for persons who have been surrendered to the United States in accordance with an extradition request to a foreign country the initial appearance must take place in the district where the offense is charged. Proposed amendments to Rules 5 and 58 require that at the initial court appearance the court inform a defendant who is not a United States citizen that an attorney for the government or a federal law enforcement officer will, on request: (1) notify the consular officer from the defendant's country of nationality of the arrest; and (2) make any other notification required by treaty or other international agreement. The changes are intended to ensure that foreign defendants arrested under charges filed in the United States receive the notifications to which they are entitled pursuant to treaty obligations of the United States under the multilateral Vienna Convention on Consular Relations or under bilateral treaties. The Department of Justice supports the proposals.

Proposed new Rule 37 provides procedures for obtaining an "indicative ruling" from a district court in a criminal case. The change would parallel new Appellate Rule 12.1 and new Civil Rule 62.1, which went into effect on December 1, 2009, and would facilitate remands to enable the district court to consider motions after appeals have been docketed and the district court no longer has jurisdiction. Appellate Rule 12.1 and Civil Rule 62.1 were intended to promote awareness of the possibility of indicative rulings, ensure that the mechanism is available in all circuits, and make the relevant procedures uniform in all circuits. Those purposes apply to criminal cases as well.

Informational Items

The advisory committee continues to consider proposals to codify and expand the government's obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963). A select group of senior Executive Branch officials, practitioners, academics, and judges shared their views on and experiences with discovery

practices at a consultative session held in Houston, Texas, on February 1, 2010. In addition, the advisory committee is reviewing the materials previously submitted in connection with earlier proposals to amend Rule 16. That review has been augmented by materials from the Department of Justice, which has recently adopted a multi-faceted approach to address *Brady* issues, including mandatory training, internal enforcement and leadership, and adoption of policies to promote greater consistency in discovery practices among the districts. The advisory committee has also commissioned the Federal Judicial Center to conduct a large-scale survey of discovery concerns among defense attorneys, prosecutors, and judges. The survey responses are presently being compiled and evaluated by the FJC staff.

The advisory committee is reconsidering proposed amendments to Rule 12. It is examining, among other things, the need to clarify whether a defendant's failure to raise before trial a claim that an indictment fails to state an offense acts as a "waiver" or "forfeiture" of the claim for purposes of appeal. The scope of the examination has been expanded to evaluate how the terms "waiver" and "forfeiture" are used within Rule 12 and whether it should be restructured.

The advisory committee is examining whether, in light of the recent Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the potential immigration consequences of a guilty plea should be added to the list of matters about which a judge must inform a defendant when taking a guilty plea under Rule 11. The advisory committee may ask the FJC to consider modifying the District Judges' Benchbook to include suggested notification language as part of the Rule 11 colloquy.

The advisory committee continues to monitor the effectiveness of the rules implementing the Crime Victims' Rights Act and to receive reports from the Department of Justice on its regular meetings with crime victims' groups. The advisory committee advised the Committee on

Court Administration and Case Management that an attorney representing a crime victim was not able to electronically file a motion asserting a crime victim's rights because the Case Management/Electronic Case Files system permits filings only by parties to the case. The attorney eventually was able to file the motion, but only after the clerk of court made special accommodations.

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed "style" amendments to Rules 101 through 1103, with a unanimous recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench and bar for comment in August 2009. Scheduled public hearings on the amendments were cancelled because no one asked to testify.

The comprehensive "style" revision of the Evidence Rules is intended to make the rules clearer and easier to read, without changing substantive meaning. Major bar organizations, including the American Bar Association and the American College of Trial Lawyers, provided substantial input, both before and after the proposals were formally published. Nineteen comments were submitted during the public comment period. Most of the comments received from the bench, bar, and public were favorable and included some very helpful suggestions that further improved the revisions.

The Evidence Rules "restyling" project follows the successful restyling of the Federal Rules of Appellate, Criminal, and Civil Procedure using uniform drafting guidelines prepared by a legal-writing scholar. Those restyling efforts began in the early 1990's. The improvement in the rules resulting from the style revisions led the advisory committee to begin the restyling work on the Evidence Rules.

The advisory committee established the following principles for determining whether a proposed change was “substantive” and therefore beyond the proper ambit of the restyling project. A proposed change was “substantive” if: (1) under existing practice in any circuit, it could lead to a different result on a question of admissibility; (2) under existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; (3) it changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or (4) it changes a “sacred phrase” — a phrase that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations (for example, “unfair prejudice” or “truth of the matter asserted”).

The advisory committee and the Committee established extensive procedures that required numerous levels of review to ensure that the style revisions were as clear as possible without changing any substantive meaning. The initial draft was prepared by the Committee’s style consultant, Professor R. Joseph Kimble. The advisory committee’s reporter, Professor Daniel J. Capra, reviewed each proposed amendment to ensure that no substantive change was made. If the changes raised any questions, the reporter and the advisory committee’s consultant, Professor Kenneth Broun, reviewed, researched, and revised the rule, providing a reliable basis for the many drafting decisions the project required. Early drafts were then reviewed by the Committee’s style subcommittee to analyze the implications of every proposed change. The advisory committee’s chair and reporter and the Committee’s style subcommittee refined subsequent revised drafts in a series of reiterative reviews. The revised draft was submitted to the advisory committee, which reviewed every rule carefully for possible inadvertent substantive changes. The process took three years, involved scores of conference calls, and produced more than 350 documents.

The drafting approaches and style conventions used in the Style Project were the same as those used in the previous restylings of the Appellate, Civil, and Criminal Rules. As noted, the intent was to clarify, simplify, and modernize expression, without changing the substantive meaning of the Evidence Rules. To accomplish these objectives, the advisory committee used formatting changes to achieve clearer presentation, reduced the use of inconsistent and ambiguous words, minimized the use of redundant words and terms, removed words and terms that were outdated or archaic, and removed redundant cross-references.

Formatting changes to the dense, block paragraphs and lengthy sentences of the current rules made them much easier to read. The advisory committee broke the rules down into constituent parts, using progressively indented paragraphs with headings and substituting vertical for horizontal lists. These changes make the structure of the rules graphic and make the rules clearer, even when the words are unchanged.

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Years of adding new rules and amending rules had led to inconsistent words and terms. Because different words are presumed to have different meanings, such inconsistencies resulted in confusion and unnecessary litigation. The restyled rules reduce inconsistency by using the same words to express the same meaning. Some variations in expression were carried forward, though, when the context made it appropriate to do so.

The restyled rules also minimize the use of inherently ambiguous words. For example, the word “shall” can mean “must,” “may,” or “should,” depending on context. The potential for confusion is exacerbated by the fact that “shall” is no longer generally used in spoken or clearly written English. The restyled rules replace “shall” with “must,” “may,” or “should,” depending on which one the context and established interpretation make correct in each rule.

The current rules have numerous “intensifiers,” expressions that might seem to add emphasis but instead state the obvious and create negative implications for other rules. For example, some past rules have used the words “the court may, in its discretion.” “May” means “has the discretion to”; “in its discretion” is a redundant intensifier. The absence of intensifiers in the restyled rules does not change their substantive meaning.

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions were rearranged in some rules to achieve greater clarity and simplicity. Words and terms that have acquired special status from years of interpretation were retained.

Each rule is accompanied by a Committee Note that explains: “The language of [the relevant rule] has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.” The Notes to some rules are more expansive in explaining a particular change.

The Committee unanimously concurred with the advisory committee’s recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Evidence Rules 101 through 1103 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendments to the Federal Rules of Evidence are in Appendix D, with an excerpt from the advisory committee report.

SEALING SUBCOMMITTEE REPORT

The Committee’s Sealing Subcommittee prepared a report based on the results of a comprehensive Federal Judicial Center study of “entire” cases sealed. The study revealed that the number of cases sealed in federal courts is relatively low. The great majority of the orders

sealing cases were required by a statute, such as the False Claims Act, or by a rule, such as Rule 6(e)(6) of the Federal Rules of Criminal Procedure. A small number of cases that were initially sealed appropriately remained sealed after the reason for sealing had expired. The Subcommittee recommended that the Committee on Court Administration and Case Management (“CACM”) consider recommending that the Judicial Conference adopt a policy statement that recognizes that an entire case is properly sealed only when consistent with specified criteria, including:

- (1) sealing the entire case is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives, such as sealing discrete documents or redacting information;
- (2) a judicial officer makes or promptly reviews the decision to seal a case; and
- (3) the seal is lifted when the reason for sealing has ended.

The Subcommittee also recommended that CACM and other appropriate Judicial Conference committees consider additional steps to improve sealing practices, such as:

- (1) judicial education to ensure that judges are fully aware of the established criteria for the proper sealing of entire cases;
- (2) judicial and clerks’ office education to ensure that both judges and clerks are aware that if a clerk or designee has sealed a case temporarily, a judge must promptly review and decide whether the seal should continue;
- (3) study by CACM and other appropriate committees to identify clearer and more detailed standards for determining when a clerk or designee may seal a matter temporarily pending judicial approval, and to establish procedures to obtain prompt judicial approval;
- (4) judicial education to ensure that judges are aware of the need to limit the duration of sealing orders and the various ways to do so, such as by stating in the order a date when the seal will expire unless a party otherwise moves, or stating in the order a date when the court will review the order;
- (5) study by CACM and other appropriate committees into how CM/ECF might be programmed to generate notices to courts or parties that a sealing order must be reviewed after a certain amount of time has passed, and to generate

periodic reports of sealed cases; and (6) consideration by CACM and other appropriate committees of local administrative measures that courts could adopt to improve the handling of sealing requests. The Subcommittee's report is in Appendix E.

The Committee concurred with the Subcommittee's recommendations.

PRIVACY SUBCOMMITTEE REPORT

The Committee's Privacy Subcommittee conducted a mini-conference at the Fordham School of Law on April 13, 2010, to consider privacy-related issues. The Subcommittee also reviewed surveys of judges, clerks of court, and assistant U.S. attorneys on their experiences with the operation of the privacy rules. The preliminary results of the mini-conference and surveys indicate no general problems with the privacy rules' operation. The Subcommittee is continuing to study these issues, including the privacy of information about cooperating defendants in criminal cases who plead guilty. The Subcommittee expects that it will submit a report for consideration by the Committee at its January 2011 meeting.

LONG-RANGE PLANNING

The Committee reviewed the Ad Hoc Advisory Committee on Judiciary Planning's *Draft Strategic Plan for the Federal Judiciary*.

Respectfully submitted,



Lee H. Rosenthal

Dean C. Colson
Douglas R. Cox
Gary Grindler
Harris L. Hartz
Marilyn L. Huff

John G. Kester
David F. Levi
William J. Maledon
Reena Raggi
James A. Teilborg
Diane P. Wood

- Appendix A – Proposed Amendments to the Federal Rules of Appellate Procedure
- Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure
- Appendix C – Proposed Amendments to the Federal Rules of Criminal Procedure
- Appendix D – Proposed Amendments to the Federal Rules of Evidence
- Appendix E – Report of the Subcommittee on Sealing Cases