Meeting of January 10-11,2002
Tucson, Arizona

Draft McCabe Notes

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Tucson, Arizona, on Thursday and Friday, January 10-11, 2002.

Judge Anthony J. Scirica, Chair
Honorable Frank W. Bullock, Jr.
Charles J. Cooper
Honorable Sidney A. Fitzwater
Dean Mary Kay Kane
Mark R. Kravitz
Patrick F. McCartan
Honorable J. Garvan Murtha
Honorable A. Wallace Tashima
Honorable Thomas W. Thrash, Jr.
Deputy Attorney General Larry D. Thompson
Honorable Charles Talley Wells

Judge Michael Boudin and David M. Bernick were unable to attend the meeting due to illness,

Also participating in the meeting were former members of the committee – Judge Alicemarie Stotler, Professor Geoffrey C. Hazard, Jr., Gene W. Lafitte, and Sol Schreiber -- and former advisory committee chairs -- Judges Paul V. Niemeyer, Patrick E. Higginbotham, Will L. Garwood, and Fern M. Smith..

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the U.S. Courts; James A. Ishida, special counsel in the Office of Judges Programs of the Administrative Office; and Christopher F. Jennings, law clerk to Judge Scirica.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Chair
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 —

Honorable Richard H. Kyle
(substituting for Judge David F. Levi, Chair)
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Honorable Edward E. Carnes
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Honorable Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting were: Joseph F. Spaniol, Jr., consultant to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Joe Cecil of the Research Division of the Federal Judicial Center. Professor Joseph – Kimble, consultant to the committee, participated in part of the meeting by telephone.

INTRODUCTORY REMARKS

Scirica — Asked everybody to introduce themselves.

He specially introduced and gave biographical background on:

Larry Thompson

Chief Justice Charles Talley Wells

Mark Kravitz - New Haven

Presented plaque to Gene Lafitte, technology subcommittee. 1995-2001

Lafitte — The staff does a great job. I have served under two great leaders - Judges Stotler and Scirica.

Alito — Made presentation to Will L. Garwood., chair of the appellate advisory committee for four years.

Scirica — This afternoon will consist of a discussion of the local rules project.

The Judicial Conference met on September 11, and no business was conducted after introductory remarks. We had several important amendments on the agenda for the Conference's approval. The most important was the restyling of the

criminal rules. Judges Carnes and Davis did an extraordinary job in restyling, which took two years and included many meetings. In addition to the published amendments, they specially targeted several hundred criminal procedure professors for input. They identified various substantive amendments. They had a 2-track process of restyled rules and substantive amendments, for eventual merger.

Tomorrow we will discuss the possible restyling of the civil rules. The appellate rules went into effect in 1998. We advised the chief justice that appellate was a success, and he agreed to go ahead with the criminal. We would come back on the civil rules.

There were three important and controversial items:

> Appellate Rule 4 and Civil Rule 58 -- dealing with finality of judgments and time for appeal -- address the time bomb problem flowing from the failure of courts to comply literally with the separate document requirement for judgments.
>
> Also, Criminal Rules 5, 10, and 43, giving a district court authority to conduct an initial appearance or arraignment by video conferencing with the defendant's consent.
>
> Finally, Bankruptcy Rule 2014, implementing section 327 of the Code, requires lawyers and accountants to disclose all their connections with the debtor and creditors when they seek appointment. Our proposed rule amendment would have relaxed the disclosure requirement with regard to the disclosure of the professional's connections with creditors. A sizeable number of people in the bankruptcy bar said that the standard in the present rule is impossible to meet and should be relaxed. The effect of the amendment would have been to allow the lawyers to exercise a degree of reasonableness in appraising and disclosing their connections with creditors..

Restyling of the criminal rules was on the consent calendar. The other two matters were on the discussion calendar.

With regard to Bankruptcy Rule 2014, two members of the Executive Committee – Judges Becker and King - had expressed grave reservations and put it on the discussion calendar. Judge Small and I both had extensive discussions with Becker and King, and we realized that with their opposition, the rule would likely fail at the Conference. Recusal is a very sensitive matter, especially in light of the

newspaper articles dealing with alleged conflicts of interests by judges. They felt that it was best to require professionals to bring all potential matters to the attention of the court, and let the court decide as to nature of the conflicts. There were also some problems with the language of the proposed amendments. So we withdrew the amendment for further consideration. The advisory committee will take it up again.

Video of initial appearances and arraignments was also controversial. It is already in use in many federal courts, with consent, and in many states. The defenders were opposed to the amendment in part because it would result in possible cost shifting to the defender appropriation. The Defender Services Committee felt that video conferencing of proceedings would undercut the solemnity and dignity of the proceedings. The Department of Justice strongly favored the amendment, but without the consent requirement. The advisory committee was split on the issue. I spoke with David Levi and Ed Carnes, and we decided that the best way to go to the Conference was with the consent requirement in the amendment. We realized that the amendment would be in trouble in the Conference without inclusion of the consent requirement. Then the Defenders Services Committee added new concerns. They argued that the defendant's consent under the circumstances could not be truly voluntary.

When committees disagree, there is a debate at the Judicial Conference. Gene Davis and I submitted written statements to the Conference and spoke to (state) defenders around the country. The defenders were generally satisfied with video conferencing because the rooms where the video proceedings are conducted are adequate, fine, the defendants can speak to their lawyers, and the technology is generally excellent. Without these three factors, however, there was less satisfaction.

The Chief Justice asked the two committee chairs whether they wanted to have a mail vote on the video conferencing proposal or defer the proposal and have oral argument at the next Conference meeting. We wanted a mail vote, and the Defender Services Committee wanted postponement and oral argument. The Chief Justice decided on having a mail vote, and we prevailed by a 2-1 margin, with 8 negative votes. We had a chance while we were in Washington to speak with several members of the Conference about the issues.

If the amendment had been presented to the Conference without the consent provision, it would have failed. We could consider eliminating the consent requirement at some point in the future if we can justify it based on experience under the new rule.

We had a wonderful conference on class actions at the University of Chicago -- thanks to the work of Judges Levi and Rosenthal, and Professors Cooper and Marcus. Ed Cooper's notes are really worth reading. The conference focused on the main problem cited to us by the bar and litigants – duplicative class actions over matters that are truly national in scope.

The first question you have to ask is whether there is in fact a problem. The answer depends on whom you ask. Debbie Henzler's research found that the reason we see duplicate class actions is that plaintiffs want to preserve their right to proceed in other courts after they have been denied in one court. Duplicate class actions present presented two problems. First they present more opportunities for collusion between plaintiff lawyers and the defense. Second, class actions are filed in some state courts to avoid the judicial scrutiny now being applied to them in federal courts as to both certification and settlement. The requirements are more relaxed in state courts.

We asked the participants whether the Rules Enabling Act and the anti-injunction act would permit the federal courts to enjoin state actions by rule. We discussed this at our last meeting, and decided that the proposed amendments on preclusion of duplicate actions should be presented to the public as a reporter's proposal, rather than as formal rules amendments approved by the committee. There were 70-80 participants at the conference, and I heard only one academic who stated that the Rules Enabling Act would allow a rules amendment to prohibit state courts. The great bulk of academics, judges, and lawyers felt it was against the Rules Enabling Act, the anti-injunction act, or was just plain unwise.

We are examining a possible legislative solution. Many bills are pending in Congress, but are not likely to pass. The Judicial Conference has taken a formal position against the minimal diversity bills in Congress because the Federal-State Jurisdiction Committee is opposed to them. it. Judge Niemeyer could not get the Conference to back off the position.

Judge David Levi and I have talked about how to proceed. We had a conference/summit in Washington in December with Judge Stamp, chair of the Fed-State committee, Judge Hodges, chair of the multi-district litigation panel, and Judge Fern Smith, director of the FJC. We presented our views that duplicate class actions are a real problem and merit a legislative solution. The chair of the Federal-State Jurisdiction Committee, of course, could not take a position on the matter. So Judges Levi and Rosenthal are meeting today with the Federal-State Jurisdiction Committee to press the case for change. The civil rules advisory committee will meet later in January on the issue.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 7-8, 2001.

Professor Cooper gave me some changes to add to the minutes. They need to be incorporated before posting the minutes.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislation

Rabiej We have been following 22 bills pending in Congress. The agenda book discusses each bill.

The USA-PATRIOT act has two provisions that amend the rules directly - Criminal Rules 6 and 41. We will discuss them later on the agenda. The statutory changes require us to take action because the restyled rules before the Supreme Court will be submitted to Congress and will take effect on December 1, 2002. if no action is taken, the restyled rules will supersede the new statute and its amendments to Rules 6 and 41. So we need to submit conforming changes to the Court, which will be addressed as part of the report of the criminal advisory committee.

Attorney conduct. Senator Leahy was successful in getting his provision into the Senate passed bill that would to require the Judicial Conference to report on attorney conduct. But the House rejected it. They support the McDade amendment. We think that there is some sort of agreement to conduct hearings and take up the matter.

Minimal diversity class action legislation is still pending.

Different versions of the bankruptcy reform legislation passed the House and Senate. The bankruptcy advisory committee was working feverishly on conforming rules. It appears that there will be no legislation, but separate parts of the bills may be taken up and passed. So the work of the advisory committee will not necessarily be lost.

Administrative

We transmit the rules package to the Supreme Court. It was 700 pages long and had to be reformatted.

Scirica The Conference merged the style and substantive packages into one single set of criminal rules amendments.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil noted that the agenda book for the meeting contains a status report on the various educational and research projects of the Federal Judicial Center. (Agenda Item 4)

Cecil I note a few recent publications - One deals with changes in technology - the Handbook on Courtroom Technology. It sets forth the issues and questions.for the court in this area.

There is a new guide to dispute resolution.

The Center is continuing to work on the Manual for Complex Litigation, 3rd edition.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito presented the report of the advisory committee, as set forth in his memorandum and attachment(s) of November 30, 2001. (Agenda Item 8)

Alito We finished the package of amendments last year. We did not have a winter meeting.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small presented the report of the advisory committee, as set forth in his memorandum and attachment(s) of December 14, 2001. (Agenda Item 6)

Small We worked very hard on drafting forms to implement the new bankruptcy reform legislation. If the legislation ever gets revised, we have done the ground work, especially on the forms. The bill would take place 180 days after enactment. So, we would have a very short period in which to get things in place.

Our meeting on September 13 was canceled.

We have proposed amendments to the rules and forms based on the privacy recommendations from CACM that were approved by the Conference. CACM has formed a subcommittee to implement the privacy policy.

We have a proposal to publish several forms that would require only the last 4 digits of a social security number.

Morris It would also require only the last 4 numbers of any account, again for purposes of privacy.

The advisory committee had thought that this was a good idea to explore and had determined initially to do this. We wanted to get input from the public. We withheld publishing the amendments because of the reform legislation, which would have required other changes. We did not want to publish piecemeal amendments. In the meantime, however, the Conference took the privacy position. Given that change, we conferred on the rules and forms changes by e-mail.

There are some statutory provisions that we cannot change. Section 342 of the Code provides that the debtor must include his social security number in any communications with creditors. Section 110 requires document preparers to include their social security numbers on documents.

Small The vote to publish was 11 to 1, but the proposed amendments do not really have the strong support of every member of the advisory committee. We want the public feedback. We will consider the amendments at the March meeting and come back to you.

Thompson The Department of Justice has concerns, and the IRS has concerns. I understand that there is widespread false use of social security numbers in bankruptcy.

Scirica The Department is quite concerned, and we want to hear the details of their concerns..

Small The problem is that the Judicial Conference has already adopted the abbreviation of social security numbers as a matter of policy.

Thompson I am concerned about restricting the numbers in some of the things we are doing.

Rabiej CACM is speaking with the Department of Justice and trying to get a compromise. We don’t know the status of these negotiations.

Scirica Move to approve the rules for publication.

Approved without opposition on a voice vote.

Small We will be discussing the Rule 2014 problems at the March meeting. We will only get one shot at amending this rule, and we will not come back unless we have Judge Becker on board, as well as the members of this committee.

Also have the financial disclosure rules out for comment and have not received much. We have had one comment on them from the General Counsel's Office of the AO.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kyle and Professor Cooper presented the report of the advisory committee, as set forth in Judge Levi's memorandum and attachment(s) of December 15, 2001. (Agenda Item 7)

Kyle There is not much to add. We have proposed amendments to Rules 23, 51, and 53 out for comment, and public hearings are scheduled. We had the conference in Chicago on class actions, and the issue of overlapping class actions is still before the committee for consideration.

Cooper We should consider whether a proposed legislative package should include a provision authorizing or inviting rules to implement it.

We have published a complete rewrite of Rule 51 on jury instructions and a complete rewrite of Rule 53 on special masters. We have had no comments, but the comments usually come in late.

Ongoing matters - The most difficult for us is the discovery of computer-based information. The first question is whether there is anything that can be done by rule and whether any rule we pass would still be relevant when enacted. It will be taken up at the January meeting.

Scirica One of the issues in Chicago was whether the civil advisory committee should take up again the issue of settlement classes. Some believe that after Amchem and Ortiz, lawyers are gun shy about settlement classes and are afraid to go down that road for fear of being overturned in the appellate courts. Is that still being considered?

Cooper It is really a question of how soon we would take it up. We published a very chaste proposal in 1996, which was neutrally noted in the Amchem decision. We decided to see what would happen in the case law following Amchem and Ortiz. The proposal has been in the background since then.

We need to distinguish among the various types of class actions. Antitrust and securities cases may have different experiences than mass tort or consumer class actions. It would be surprising to see a proposal emerge by the June meeting.

Niemeyer Every time somebody looks at class actions, the problems seem different. Under Judge Higginbotham, the focus was on the range of cases for certification, while still fostering settlement. Under me, we discussed opt-out and settlement. Now the emerging problem is the repetitive, duplicative use of class actions.

It goes right to the dual sovereignty problem. If we change the rule, we may be doing what was done in 1966 – encouraging further class actions. We could even be unintentionally setting up a bureaucracy to deal with social problems. Nevertheless, we still need to consider and analyze and think about the problems. Congress is looking for help, but we do not have final answers. It is just as tough a problem as always.

Hazard A number of other countries are developing class suits in a different context - Canada, England, Brazil, Australia. The rules committees might want to organize a project to look at the class suits in these countries. We could get away from the federal-state problem for the moment and consider the issues of defining the class, providing due process, etc. How would one design such a system that provides fairness and efficiency? There is a lot of stuff in Rule 23 that is redundant. We need, for example, to look more at the substantive validity of the claims. We might want to think about a procedure, mandatory or optional, that would determine the merits of the individual claims, and so on.

It would be possible to do that. We could invite the A.L.I. to do it. It would take about five years. But the problems will still be there for us in five years. Without careful study from this perspective, you will not come up with a truly satisfactory solution. We should speak with David Levi about it and see if we can get the FJC involved.

Kane I agree with Jeff. Rather than be reactive and respond to questions, we might want to start from the front and design a different approach.

McCartan There is a lot of merit in this. Res judicata and collateral estoppel are a big issue.

Hazard The doctrines of res judicata and claim preclusion are not constitutional. You could devise a system that made them inapplicable.

Scirica Take it back to the advisory committee.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schleuter presented the report of the advisory committee, as set forth in Judge Carnes' memorandum and attachments of December 3, 2001. (Agenda Item 8)

Carnes John Rabiej has already pointed out the problem posed by the USA PATRIOT Act.

The supersession clause would override two rules that Congress has just rewritten. We took the two rules and restyle them a little bit to make them less awkward and get them to the Conference and the Supreme Court without publication. Suspending publication requires us to avoid all substantive changes. We acted by memos and telephone.

Section 203 of the Act rewrote part of Rule 6(e) on grand jury secrecy to authorize the sharing of counter-terrorism information with law enforcement personnel. We restyled it and put it where it should be in the rule. We made fewer style changes than the style committee wanted us to make. The only issue that could be a problem for us is how we resolved an ambiguity in the statute where Congress requires law enforcement to disclose to a court the fact that information has been shared. The legislation is unclear at to which court the disclosure must be made. Senator Leahy had a floor statement mentioning that the disclosure would be to the court where the grand jury meets.

Other parts of the rule were ambiguous or terribly written that we did not change. On page 2 of Rule 6(e), at lines 29-30, refers to foreign intelligence information involving a "United States person." Surely, they meant "citizen," but if you look at the Leahy statement, he was interested in protecting resident aliens too. So we left the rule the way the statute wrote it.

We had a question on the first page about sharing information with federal law enforcement agencies. Questions were raised by members as to what "protective" means. They must have meant the secret service. We erred on the side of awkwardness and poor style to avoid making any possible change in substance.

We incorporated some style committee changes and would have adopted others if we had had more time to work on the amendments.

With regard to Rule 41 on search and seizure, section 219 of the Act was a bit less awkward. Here we adopted more of the style subcommittee's recommendations. The statute speaks of a magistrate judge issuing a warrant for person or property within or without the district. We left that language in the rule. We also did not make a change on line 7.

Our recommendation is that the Standing Committee approve the changes to Rules 6 and 41 and forward them without public comment to the Conference so they can catch up with the style package.

Shadur We had a similar problem with Rule 615 of the Rules of Evidence. We added language to say "except as otherwise authorized by Congress." This way we avoided trying to figure out what Congress means, and we avoid the Rules Enabling Act problem. You could consider doing the same thing here.

Scirica Yes, but I am not sure that it works here. People will want to look at the rule and see in one place what it means.

Bullock Does this put us in any conflict with Congress, i.e., that we are tinkering with their language?

Carnes They should realize that we are speeding up the rules process and helping them. Also they wrote language that was based on the old rules, not the restyled rules. I think that they would appreciate our efforts to blend the statutory provisions with the rules.

Rabiej We will notify the Congress of the changes..

Scirica We have to get it to the Conference in March. We could have just repeated the language of the statute, but the advisory committee did the right thing. We have to discuss the matter with the Judiciary Committee staffs before we take it to the Judicial Conference.

Kane On line 37 on page 2, you need an "or" between the bullet points.

Carnes That is actually the way they did it in the Congress. You would also need it in other places.

Scirica Motion to approve Rule 6. Approved without objection.

Motion to approve Rule 41. Approved without objection.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur presented the report of the advisory committee, as set forth in Judge Shadur's memorandum of December 1, 2001. (Agenda Item 9)

Shadur The Standing Committee approved publication of 608 and 803. I scheduled our hearing in DC on January 23, the day after the hearing on civil rules. I had hoped that we might get somebody who was coming to DC to stay over. But nobody came. We canceled the hearing.

We have received only a couple of written comments, either in general or on 804(b)(3) on the questions you committee raised. But the comments tend to come in late. So I will not make any interim report at this time to the committee. The advisory committee will meet in April, and we will report back in June. We skipped our October meeting.

We sent in our completed form on continuation of the evidence committee. I hope we are preserved.

Scirica I hope so too. The advisory committee is essential, especially to respond to Congressional activity. We need to be available to address issues that Congress might take up.

Has the Department of Justice been consulted on Rule 804(b)(3)

Capra We are in consultation.

Thompson Our Criminal Division has some concerns with the proposed amendment.

Capra We have canvassed the case law in the states and have spoken to some of the state people.

ATTORNEY CONDUCT RULES

Scirica We have spent a great deal of time on this issue for the last 10 years. The matter came to our attention originally through the local rules project. We found that

many district courts had rules that conflicted with those of the state supreme courts.

There is a general consensus that if we were to do something in this area – and that is a big if – it would be to have a rule of dynamic conformity. But the problem is the regulation of federal government attorneys. The 4.2 issue is perhaps the most intractable, and certain members of our committee have been involved with the Department of Justice on this issue. Geoff Hazard has been on the Ethics 2000 committee and the ABA, and Chief Justice Veasey has been very much involved.

Last year we decided not to move ahead until the new Administration has had a chance to assess what it wanted to do in this area and whether it wanted to negotiate further with the ABA and Ethics 2000. I was at a meeting of Ethics 2000 in Philadelphia in December. They will recommend to the ABA that the proposed 4.2 be adopted, with the addition of language referring to a court order. Chief Justice Veasey and Geoff Hazard are very much in favor of keeping that court order language in the rule.

If the ABA adopts Ethics 2000 recommendations, they predict that the state courts will adopt the new rules. It would allow federal lawyers to go into state courts and ask for orders allowing contacts with unrepresented parties in specific cases.

It is still possible that Congress could act and delegate to this committee the authority to write rules or make recommendations. We are resistant to take it on as long as Congress may act. The Senate wants to repeal the McDade amendment, but the House will not do it.

It would be better for us if there were a consensus in Congress and among the Department of Justice and the ABA and state chief justices. We would be prepared to formalize their product with federal rules.

Thompson The 4.2 issue is the one that gets the attention, but Department of Justice lawyers have other issues that concern them on a daily basis.

First, there is the problem of choice of law. There is a great deal of uncertainty as to which rule applies. You may have a grand jury in Chicago and witnesses in Los Angeles. Which law applies? Also representations may be made to a court by a lawyer who is licensed in another state.

Second, the Gatti decision. The Department of Justice lawyers supervise undercover operations. It is good policy for these operations to be supervised by a

lawyer. But in Oregon it is a real problem. We had apprehended bad guys, and they had newspaper clippings of the Gatti case on their person.

I have not had a chance to speak with the Attorney General about it. The Leahy-Hatch bill would give a chance to resolve all three problems, especially choice of law and undercover operations.

Hazard — The Ethics 2000 will not be a vehicle for complete resolution of government attorney conduct issues. The Department should then take up matters with the ABA. There are further possibilities for negotiations with the ABA and the Conference of Chief Justices.

Thompson — That is what my personal view is. I do not speak for the Department on it.

Wells — I have been involved in it. Geoff is correct. Coming to accommodation with the ABA would help. But the Conference of Chief Justices also need to be an involved player in order to work out such issues as choice of law. We need to address multi-jurisdiction issues. The time is ripe to deal with them. I would be more than happy to facilitate the matter.

Coquillette — This committee got involved in it, not of our own initiative. Local rules govern attorney conduct in all the federal courts, and the rules are all over the place. We got involved when we tried to address the proliferation of local rules. We put it aside for a while so we could address local rules generally. This committee has jurisdiction over local rules and have a Congressional mandate.

Our subcommittee/task force on attorney conduct has not met recently because we wanted the new Department of Justice to assess the situation. The US attorney got the 1st Circuit's rule on 3.8, grand jury, overturned. Our attorney conduct task force is in reserve until we need to act if Congress acts or there is an agreement.

Scirica — Is the committee in accord in doing nothing on this matter at this point until we have to?

Consensus.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Capra — Many bankruptcy courts are now using electronic case filing. There are 12 bankruptcy courts and 7 district courts now using CM-ECF.

Our technology subcommittee prepared changes to the civil rules to allow electronic filing on agreement of parties. They deal with filing. The subcommittee participated with CACM on model rules for case filing. Nancy Miller and I drafted them. We worked from the local rules of the pilot courts. Those models were issued by the Conference and appear behind Tab 11. The bankruptcy and district rules are close to identical. They are models only. Although labeled as rules, they are generally found as genera3 6rders, rather than rules. It is important that they be flexible. The Southern District of California is now elevating its general orders into local rules. We are monitoring and trying to help.

One problem is that some courts take the position that electronic filing may be made mandatory, which appears inconsistent with Rule 5. Those disputes between courts and lawyers have been resolved without court opinions yet. We have been advising courts that mandatory ECF is really not permitted. It has to be by consent. The Conference has adopted that position by adopting the model rules.

The new Rule 5 says that the consent must be explicit, and in some cases it has not been explicit. Many courts do not tell the lawyers clearly that they are signing up for everything.

Eventually the issue will be whether any of these rules should be elevated to national rules. I think that it would be a long time before they are made nationally. It will not be before 2005 that we have every court on board. We should wait until after the process is completed.

Rabiej CACM has asked for permission for pilot courts to permit public access in some courts to criminal records, but the Conference said there was no emergency. They will probably come back and ask for a pilot project.

Capra We should be involved in any model local rules for criminal cases. We had a liaison last time, and we did the work.

Privacy.

The technology subcommittee worked with CACM, and the report is behind Tab 11. The report says, essentially, that public is public. But they made exceptions for social security cases, social security numbers, and criminal cases. They thought of a possible amendment to Rule 11 sanctions, but Gene persuaded them that it was not necessary.

CACM is now involved in efforts to implement the privacy statement. They are trying to coerce the bankruptcy advisory committee to limit the social security numbers. They are working on a nationwide model rule.

Niemeyer We have been concerned about a growing body of local rules. We should take the initiative and decide what the national practice should be. Once the local rules are created, it is difficult to change them. It is not too early to start drafting national rules.

Shadur This will move district judges more into the area of protective orders. They will use their discretion, and we will have disunity.

Capra There is an inconsistency in trying to limit local rules and yet drafting suggested local rules for the courts. Maybe it could be done on a temporary basis, especially in a fast-growing area.

Lafitte The use of local rules is inherent in a pilot ECF program. We tried to make the current local rules more uniform.

Niemeyer Maybe the next step is to have the one model rule, rather than each court's rules.

Coquillette Every 10 years, Congress gets upset about local rules. It is seen as an evasion of Congress' prerogatives. Local rules evade Congress' supervision.

Wells Almost every state is dealing with this same problem. We in Florida are trying to reach accommodations with clerks' offices, who are independent of the courts themselves and control the documents. We need to iron out some principles that could apply to all such efforts.

Scirica Would you volunteer to be a member of the technology subcommittee?

Wells What you really need are some of the people in the state systems who do the actual work.

Fitzwater Protective orders are an appropriate device.

The technology is moving so fast that we cannot yet deal with the problem on a national level at this time. We need to go with model rules to give the courts a source to go to, rather than create their own.

We need to be involved and not let another committee take the lead.

Capra The subcommittee is working with the civil rules committee on electronic discovery.

Also I did a report on whether rules changes are needed in the evidence rules, and said that they were not.

CACM is considering e-filing rules for criminal cases too. I just heard about it. We should be involved in this project.

LOCAL RULES PROJECT

Scirica Mary Squiers is upstairs in bed and will not be able to make the presentation this afternoon. Dan Coquillette will handle it for her. After Dan speaks, we will hear from Dan Capra, who has singled out the issues that we must consider in deciding how to proceed.

This is a big project. We need to be involved in stages. Dan Capra and Dan Coquillette suggested that we should proceed by way of persuasion first, so the courts can make the changes on their own. But we may also want to think about further action, such as action by the circuit councils. I hope that we would discuss all the issues today and have a pretty clear idea of how to proceed, even though we do not have to decide it all.

Some of the local rules conflicts that we see are pretty straight forward. Such as several courts not having adopted the uniform numbering system. I could contact the courts personally.

Rules that clearly contradict national rules or statutes also seem pretty straight forward. Also, areas that have been abrogated by statute or rule.

Obviously the most difficult area is the inconsistent rules. If we adopt a broad definition of inconsistency, then we will have a lot to do.

We have to make choices as to implementation. One thing to consider is adopting model rules.

Coquillette It is a real disappointment for Mary Squiers, since she has spent several years on this project.

The number of local rules has grown greatly. She has organized them into categories with real insights as to the substance. It is a huge achievement.

In 1983, Congress became seriously concerned about the proliferation of local rules because they do not go though a Congressional screen, like the national rules. They are an end run around Congress and the rules process if they are inconsistent. Congress was going to pass a statute that would make the Standing Committee responsible for maintaining uniformity and building on a power to actually review local district and circuit court rules and to abrogate them. Chair Judge Gignoux said that that was the last thing we wanted.

When Congress passed the 198 amendments, they took us off the hook with regard to district courts. The review was given to the circuit councils. But we still have the statutory authority with regard to the courts of appeals. No other committee can deal with this. The local rules cut across several disciplines, civil , criminal , etc. So it is our special, direct responsibility.

In 9188 a deal was cut with Congress. The local rules process was toughened up to require notice and input. They asked us to toughen up Rule 83 and the counterpart rules to make them. We have also added tougher requirements re impact of local rules and renumbering.

Also part of the deal was that we would do a complete review of the local rules. Thus the local rules project was born. The results of the first project were manifold. Every court was given a report addressing the rules from their district or circuit that raised concerns. The reports were very low key and designed to be helpful. In about 60% of the cases, the district or circuit court dropped or modified the rule. We had a high degree of voluntary compliance with the project.

For those courts that did not voluntarily comply, they were not cooperative. They did not even want to let the AO know of their rules. We still today have some courts that have not renumbered their rules or posted them on the internet. So a few are very stubborn. But most were cooperative.

We also used the report to advise the committees of areas in which a uniform national rule would be advisable and would supersede a lot of local rules. Some of the most interesting suggestions for national rules came from the project.

In 1990, Congress passed the Civil Justice Reform Act, which went in the opposite direction. A host of new local rules were adopted, under the aegis of that statute, rather than the RULES ENABLING ACT. When the Act sunsetted, it took away the authority for many of these local rules. Many of them are still on the books. So we have some of the same issues today.

Today we are getting pressure again, both from Congress and from the ABA, which is making it a high priority. The House of Delegates passed a resolution last year that local rules should exist only where there are real reasons for them such as geographical or demographic reasons for them. Otherwise, the rules should be as uniform as possible. The Department of Justice has always pushed national rules. But also now the big accounting firms, because they see themselves as eventual providers of legal services. So, there are some heavy players in both Congress and the bar associations and business that are interested in local court rules.

Thus, the committee decided to have a second local rules project. Mary Squiers has done a terrific job. Her memo and executive summary are in the book, plus a summary of the methodology. About 85% of the report itself is finished. We are not in the status of being able to make decisions.

One conclusion is that the number of local rules has increased substantially again. Our earlier gains have been erased. The number is misleading because there are many subrules.

Judge Bill Wilson of Arkansas had proposed as a motion a limit of 20 local rules, with no more than 3 subrules. He had a lot of support, even though it was not a serious motion.

The study shows that there is no geographic or demographic sense to the proliferation of local rules. The big issue before the committee is what we do with this. Charles Alan Wright said that local rules are the number one problem of the federal rules – the soft underbelly, as he called it. Are we going to have a national system, or a balkanized system? A lot of people think that local rulemaking is good. There may be good reason, for example, for local rules, such as in technology areas. Also, if we limit local rules, judges will use standing orders and operating procedures instead. That would be worse.

Dan Capra has agreed to be a stalking horse and has included a position paper which sets out the major controversies.

There are different things this committee can do -- some hardball and some softball. One of the softball things would be to communicate with each court and council to get their feedback in a totally cooperative, non-coercive way. This would get a good sense from them. Our experience is that half or more of the rules would be changed voluntarily. The harder actions may be premature at this

point. One hardball approach would be to report the local rules to the circuit councils. We should contemplate long before we do this.

Another hardball approach would be to take away whole categories by coming up with more national rules that preempt the field. The whole issue of attorney conduct is one that we have put aside for the moment. There are about 800 local rules on attorney conduct. National rules could abrogate them.

We should try a much more conciliatory approach before we consider this.

Fitzwater The courts were required in 1996 and 1997 to renumber their rules. Our court has more rules now because they have to comply with the national rules. We have both local civil and local criminal rules.

Coquillette This has indeed resulted in an increase in the number of local rules. Mary has come up with numbers.

Also the Congress and the national rules encourage local rules in some areas. Local rules on electronic filing is one good example.

Local rules do have a benefit in dealing with certain kinds of complexity.

There is no clear right answer.

Capra My report is divided into three parts:

1. What rules are most objectionable?
2. How can the findings of the project be used?
3. What to do?

What rules are most objectionable? The ABA criteria are not complete. There are valid reasons for local rules other than geography and demography. The national rules encourage local rules in some areas.

First, the ones that are inconsistent with the national rules are most objectionable. The easiest are where there are direct contradictions, such as where the local rules give a longer time to respond than the national rules or permit something that is prohibited by the national rules – or vice versa. In some local appellate rules, there are page limits that are less than FRAP 32.

Inconsistency with the spirit of the national rules is more touchy. One of the types is where the national rule gives a judge discretion, but the local rules are more

stringent and set limits and bright lines rather than by case by case basis. Our position is that these local rules may actually supply a need by giving the bar guidance. They are OK where they describe what would be the result in the vast majority of the cases. So a bright line may be good.

A more problematic spirit rule is where there are presumptions in the national rules that are reversed in the local rules.

Finally, there is inconsistency with case law. They do not necessarily violate Rule 83, but they are objectionable nevertheless. The district courts should be informed that their local rules conflict with the case law in the circuit.

Next there are local rules that duplicate national rules. The paper points out that the national rules themselves sometimes duplicate statutes. So should the national rules be cleaned up? Duplicate national rules, though, are not prohibited.

Mary points out that many local rules are pernicious because they try to paraphrase the national rules. Also local rules duplicate case law, but this is OK and may help lawyers.

Local rules that do not conform with the national numbering system. We should contact the 11 courts. But numbering is not a panacea, since judgment is exercised in deciding what number to assign to a local rule.

Finally, Mary points out that there are local rules that are outdated, such as those dealing with naturalization petitions.

2. How can findings of the local rules project be used?

No funding has been given to the monitoring system. The 9th Circuit pointed out conflicts, but there was no follow up.

3. What to do?

Circuit councils have authority, but do not have funding for review and monitoring of local rules.

Another proposal was to have a uniform date for local rules to take effect. But it was said in the standing committee that it would conflict with the RULES ENABLING ACT which gives the courts authority to set the date. It was considered a problem and must be resolved. It may require a statute. You need an exception to the p

Conditioning effectiveness of a local rule on presentation to the AO and/or approval. Would this be outside the RULES ENABLING ACT also? This might also require a statute. But there is something to be said for a publication and submission requirement. Many of local rules cannot be found easily even today. Senator Lieberman has legislation pending that would require all local rules to be posted on the internet.

Conditioning effectiveness on approval of a central authority. It has been proposed by many academics. But it is questionable. Among other things, it would lead to more general orders.

Model local rules are another possibility, but they are problematic. If they are so good, why not put them in a national rule.

Amend the national rules in areas where there are many local rules. It might may sense to have more national rules, such as for ADR, that would end these local rules.

Professor Roberts proposes limiting local rules to certain subjects. Would require statute.

Also limiting the number of local rules, a la Bill Wilson. But crafty drafters could get around it. Also, it is unfair since there are national rules that encourage or mandate local rules.

Experimentation. There was a proposal to Rule 83 that would have allowed inconsistent national rules for a 5-year period. But it raised RULES ENABLING ACT problems. It would require a statutory change. It would allow controlled experimentation.

Number 10. A lot of local rules require local rules.

11. A lot of local rules are really not local rules, but administrative information. It has been suggested that these could be dropped from local rules and put in procedural manuals and other documents less than local rules.

Scirica Before we begin the discussion, we should hear from the lawyers.

McCartan Dan did not mention standing orders that conflict with the local court rules, as well as the national rules or statutes.

Local rules have not been a real problem for us. We make sure that we are up to speed on them when we practice in a court. We litigate throughout the country.

Coquillette Do you rely on local counsel?

McCartan We have offices in many places and use local counsel in others.

C. Cooper I disagree with Pat's assessment. Local rules are a chaotic, irrational mess. We involve local counsel in almost all of our cases and the benefit of their local expertise. It is not impossible. We have run into many of the inconsistencies. But we keep asking – to what end are these local rules. Why should our clients pay us to have to master these ideosyncratic preferences of local judges.

There are many good local rules that are warranted given unique situations in the district. There is a good function for the local rules process as a laboratory for experimentation, such as electronic filing, before national rules can be promulgated. But the objective should be eventual national rules. Reform is very much in order, and I intend to favor the hardball approaches that Dan Coquillette has suggested. I think that the softball responses are inadequate. The Standing Committee itself could be vested with some statutory authority to review and abrogate the district court rules. At least, we could decide what fields are appropriate, and which are not appropriate, for local rulemaking. This would take whole areas off the table for local rulemaking.

McCartan I still think, though, that it is a perception, more than a reality.

Kravitz I have served on our local court's rules committee, the CJRA group, and the 2nd Circuit's committee. I take a midway position. Lawyers can find the local rules and can engage local counsel. This is not the problem. The larger question is – to what end? The local rules generally come down just to a question of the local styles and preferences of different groups of judges.

We have standing orders from our own district court that contradict the local rules, as well as the national rules. Such as on summary judgment. On the other hand, local rules may help. When I was on the CJRA committee, we worked on local rules to deal with problems that were not addressed by the national rules. Where there are areas that you do not want to address in the national rules, we may consider model rules.

Fitzwater Four quick points:

1. Another way to look at local rules. It puts a form of institutional pressure on judges to follow a procedure. It promotes uniformity among judges on the same court.

2. There are points in the national rules where there are gaps. Rule 56(c) says that a motion for summary judgment will be filed 10 days before a hearing, but says nothing about a response, briefing, presentation, etc. So that local rules complete the national rules.

3. We use local rules to give guidance to the bar as to how to cite cases and documents, etc. It helps us to decide cases earlier.

4. Except for some of the academics, who are more interested in the principle, I have not heard good arguments from lawyers. They deserve notice and fair application. Local rules need to be widely available and fairly applied.

Shadur Uniform application in a large district such as ours is very important. In renumbering the local rules, we got rid of a lot of underbrush. But it would be very difficult to take a hard line, because we would drive the local preferences underground.

The local rules provide procedures that expedite litigation by filling gaps in the national rules. They should have the opportunity for doing so. The key issue is to decide who the policeman will be. I am concerned that a national body would be a special problem. The circuit council may be better equipped to handle it since they know local conditions better.

Bullock I have come full circle. We opted out of CJRA and went on local rules. I think today that uniformity is important. It keeps the litigants from getting sandbagged. I don't know how to do it. A strong presentation each year to chief judges could help. Submitting the rules to the circuit councils could help, but the 4th Circuit Judicial Conference does not have the time to do it. The most effective things might be a letter from the circuit council or the Judicial Conference. We do need some local authority, though, such as on procedures for summary judgment.

Murtha You have to leave it up to the local district courts to voluntarily comply with the national rules. We find that the lawyers are the ones who want more local rules, and we resist them. We do not have a lot of local rules. I would leave it up to the district courts.

Tashima — We have to recognize that each district court is a separate entity to admit its attorneys and issue its local rules. I agree with Fitzwater. It is not at all clear what is in conflict with the national rules and what is consistent with them. We also do not want to make decisions and mandate complete uniformity on such matters as motion practice. Some areas we just do not want to address in detail. We have to tolerate a certain amount of diversity.

Niemeyer — You can make a good case that national law requires national procedure. The policy should be to favor national uniformity. It is good for the system of justice. There is a lot of difference among the bar on such matters as discovery, but they have been nearly unanimous at our conferences that there should be a national procedure, one way or the other. We should listen more to the lawyers and Congress in this area.

Small — The bankruptcy committee learned the truth of Judge Tashima's observation. They did a study of the lawyers, who did not like all the local rules. So the committee came up with a litigation package, which was a disaster. I am a supporter of the Fitzwater school. We should focus more on publishing the local rules and making them available.

We need to do something about the inconsistent rules, but the softball approach should be followed.

McCabe — The focus of the bankruptcy amendments was on motion practice, which resulted in a lot of backlash form the courts.

Coquillette — It is hard to tell who is in charge or who is most interested in Congress. The voluntary approach is the best because it gives the local judges the opportunity to comment and provide feedback to us. We should also look at areas where there are lots of local rules. It may be that there are a few areas where some national fixes would take care of many local rules.

C. Cooper — Reforming the local rules problem could well beget a far worse situation. For example, we could drop the efforts if we see a move to more general orders and judge by judge instructions. Let's fix Rule 56 if there are lots of local rules inconsistent with it.

Bullock — We don't want to have a national lawyer penalized for a violation of the local rules. We have general uniformity now on discovery.

E. Cooper — Experience with local rules can provide a sound basis for a national rule. Hardball becomes beanball. Local rules can be very valuable, such as Rule 26(f)

discovery conference, which cam from local rules. Rule 56 is a particularly rich illustration. The Standing Committee approved a complete review of Rule 56, but was rejected by the Judicial Conference. Partly because the revised rule accurately restated the standard. Some judges opposed it because there was no need to restate the standard. Others did not like the standard itself.

In 1995 it was thought to revise Rule 56 but stay away from the standard. But it was thought too soon to do it. We may be ready to get back to Rule 56.

Thrash I am a member of the Fitzwater school and see the value of local rules. In our district, the national and local rules together provide a good balance. We should not take a position towards local rules that is based on problems with those courts that have problematic local rules.

C. Cooper The local rules are indeed working within the districts, and the lawyers can find them out and comply with them. But when you pull back and look at all 94 districts, it does not seem rational to have such diversity. On its face, it is not a good thing.

McCartan Congress is not going to be too concerned about inconvenience to lawyers who practice in several jurisdictions. They will be concerned with local rules that conflict with the national rules or those local rules that raise important policy issues, such as jury trials. We should focus on those local rules that conflict with the national rules and those rules that present serious policy implications.

Scirica Pat has hit the nail on the head. Congress will be most interested in the policy matters. Congress is concerned that local rules bypass the Congress.

Schlueter In 1996 Judge Davis, the criminal committee chair, reviewed 5 different rules that had been the subject of local rules that would be national rules. We decided only to adopt one of them. The only one we pursued was one dealing with presenting jury instructions. There is no way that the advisory committee can micromanage the local procedural variations.

Another recent example is the recent amendment regarding video conferencing. We left it up to each judge. Our philosophy has been to give judges discretion to decide matters on a case by case basis. Our video rule is just one sentence. We give additional guidance in the committee note. We assume that local courts will draft local rules, with input from the US attorney and defense counsel, setting out the procedures for video conferencing.

Local rules are here to stay. If it is clearly inconsistent with the national rule, it should be fixed. Proliferation by itself is not a problem. Many of the rules, though, are not available. I tell my students that they have to talk to local lawyers or the clerk of court to get the details in other districts. I suspect that lawyers look to local rules first.

Scirica Statutory mechanisms to enforce uniformity in this area.. In my circuit, the circuit executive's office looks at the local rule. If there is a conflict, it is usually negotiated with the district and resolved. If not, the circuit council can act.

Rabiej I have received 3 calls from circuit councils seeking funding.

Capra Mary says that some circuits take it seriously and others not. We might want to consider working more closely with them.

Scirica We should be speaking to the chief judges of the circuits.

Capra We should speak to them about inconsistency, rather than proliferation.

Coquillette We should also make sure that the local renumbering gets done.

Kane It doesn't seem too strong to go to the councils at the same time as the districts. They could get a copy of the reports to the districts.

Coquillette The last time, we held back until after the courts has an opportunity.

Stotler The committee is charged with continuous study of the rules. Going to the districts first is like exhaustion of administrative remedies before you go to the circuit. It makes for a better report. It could be brought to the conference of chief district judges and that of chief circuit judges. We could clean up the national rules to get rid of those that duplicate the statutes.

We do need to do something with the report. It is meritorious and the critical points have been identified. You need to follow up and send reports to each district.

Scirica I agree. And the chief judges of the circuits should get copies of the letters to the district courts.

We are not likely to come back to this issue for another year. The June meeting is very full. We should take the first step of acting on the report by sending letters to the chief judge. The question is how specific we need to be. Some are pretty

clear, such as renumbering and inconsistencies and duplications and outmoded rules. The trickier area is the inconsistencies of local rules with the spirit or the national rules or case law.

Niemeyer The circuits have responded differently. The 9th Circuit has been very active. My own circuit has been oblivious and would probably not act. So if you use softball approaches, some circuits will not respond. You may need more than one form of letter.

Scirica I might need to make telephone calls as well.

Bulllock Why not start by going to the next meeting of chief judges first? Explain the situation and give examples. Let's move.

Scirica We meet with the chief judges twice a year. I will raise it with them (in March).

Murtha Also go to the conference of all chief judge in April. It would have a bigger impact.

Fitzwater I agree that we need to do something. When we reach the point of telling a court that their rule is a problem, we need a follow up. It is not enough for just the consultant to tell the court that the rule is inconsistent.

Scirica I have been wrestling with the issue. The first letter could be low key and could say that our staff says that there is a problem and ask your input.

Shadur Why not say that we have this report and think that it would be very useful to have your input as to the function that your local rules serve. We could put the burden on the court asking why these local rules are in place. It would give the committee good information.

Capra I agree with Fitzwater. In here report, Mary herself is not completely sure on whether many of the local rules actually are in conflict.

There are other things in the report, such as model rules. You have to decide whether you want to give the whole report to the courts. We could also point out to the advisory committees where there are problems in local rules that could be addressed by the national rules, such as Rule 56.

Scirica Is there a consensus that we proceed along these lines of voluntary input and compliance. We would defer to a later date whether to involve the circuit councils.

Model rules. There is a consensus that they are appropriate in areas where there is a fast growing area. Once a court drafts its own rule, it does not change it.

Kravitz — Model rules are very helpful to local rules committees in drafting local rules. Local rules help to moderate judge by judge orders and procedures.

If there are areas, like Rule 56, where the national rule could deal with it, there should not be model rules. But in areas where local rules are encouraged, like electronic filing, model rules make sense, but not everywhere.

Kane — Model rules are best where there is something new or a gap. The courts may react negatively to an attempt to confuse a critique of their local rules with a model rules. They would see it as the first step towards nationalization of the rules. We should discuss model rules separately.

Coquillette — We should not send out the model rules part of the report at this time. We are still considering model rules in other areas.

Capra — We could give Mary instructions on breaking out particular areas for consideration by the advisory committees.

Scirica — Good idea and consensus.

Rabiej — The ABA Litigation Section is working on a report on local rules. They have deferred it until Mary Squiers' report is done.

Model local rules should go through the Judicial Conference. You might want to consider a change in our jurisdictional statement to give us authority to coordinate or supervise the drafting of model rules.

Schlueter — In the 1980s some other committee drafted rules on sentencing procedures.

Scirica — Rules on financial disclosure party disclosure are not on the agenda. We decided that this was not our area of expertise. They fall under the jurisdiction of the Committee on Codes of Conduct. They were also not procedural rules, but the lawyers wanted it in the rules themselves. We thought of asking the Conference for authority to issue rules that would be more comprehensive. The FJC study showed wide variation among the courts on what needs to be disclosed. My question is whether this is an area where there ought to be uniform federal rules. If so, should be ask the Codes of Conduct Committee to draft them. We would then

publish them and work with them in tandem. We do not have to decide this today. I will raise it again tomorrow to see whether we have a consensus.

I also need to thank David Schlueter for his work on revision of the criminal rules.

OBSERVATIONS ON THE RULEMAKING PROCESS

Agenda Item 13

Scirica Introduced Smith, Niemeyer, Stotler, Garwood

Coquillette Hazard will lead the discussion.5 topics behind tab. 13
The topics owe a great deal to the self study in 1996 under Judg Judge Stotler, Easterbrook, and Tom Baker. The 5 topics are:

1. Our overall deliberative procedures
2. Restyling of the rules – should we do the civil rules?
3. Response to rapid technological changes – filing and discovery
4. Committee notes – are they too long, should they include cases, what is their function?
5. Simplified rules of civil procedure.

Hazard A two-page memo has been distributed to you following a conversation with Scirica and Coquillette over the procedures of the rules committee.

In terms of the technique of the rules process, it is just about right – drafting as though in final form proposals for the modification of existing rules, first in the advisory committee and then in the standing committee. It is a long and slow process, but based on experience, it cannot be much different from that in this country, with wide interests, differing views, and the need for wide input. No fundamental changes called for.

I tried in the memo in concise form to describe the environment. The first topic for discussion may be whether I got in right in the memo.

First – most amendments worth doing are controversial in some degree.

Second, the process is complicated and should be so.

Third, many of the important and controversial changes arguably affect substance and must be considered with t a process outside the rules process itself. This is true of class suits and discovery.

Fourth, we have to be attentive at all times to the superior authority vested in Congress. Some changes that are important can only be made by Congress, such as class suits, the anti-injunction statute, overlapping class suits, federalism. Fifth, there are less important amendments, less hot amendments, that could be done in batches. The restyling has lots of possibilities for that, such as cleaning up Rule 56. The rules could be cleaned up. Much good could be done without making significant changes through the styling process. The appellate and criminal efforts took a lot of time and effort and were very successful. In civil, we may want to try to do it in batches.

Finally, trying to maintain open communication with relevant people in Congress. The more communication the better.

Higgin. I agree with Hazard's observations. I would add that a lot of the ways that the rules proses

Coquillette We do not have to make any decisions today as to whether we are going to restyle the civil rules.

COMPUTER BREAK DOWN – FILL IN FROM WRITTEN NOTES

Higgin. It was very hard to achieve results with Rule 23. There were many interests involved.

Niemeyer The process must of necessity remain complex. The conferences we have held with bench and bar have been very beneficial. The use of subcommittees is also very beneficial. They can meet more often and focus their time on a particular subject.

We invited many think tanks, as well as the Federal Judicial Center, to help us. This usage should be regularized.

The reporters are key. We have great reporters, and they do great work on a wide variety of subjects.

Smith The Federal Judicial Center would be very willing to take an active role in supporting the rules committees with research and analysis, to the extent that its resources allow.

We are revising the Manual on Complex Litigation, motivated in large part by the need to revise the chapters on mass torts and class actions.

Stotler We are in the debt of several professionals who serve the committees, such as Dan COQUILLETTE, Dan Capra, Ed Cooper, Peter McCabe, and John Rabiej.

Being "practice" is not a word that comes to my mind for the rules committees. We should deal with specific issues and problems.

The initial reaction to the restyling project was that we were doing something that was not necessary and were looking for work. We found great disparities and inconsistencies in the same set of rules. We met the Chief Justice in 1995 and described our goals for the restyling project. His response as to the Rules of Evidence was startling. He was completely opposed to restyling these rules.

The concept of batching and working with groups of rules is good, but the Supreme Court said that we would have to restyle all of a set of rules at one time. We met with Steve Breyer and devised the "quicky" memo describing what is in the proposed amendments in brief.

The heavy lifting for the rules process takes place in the advisory committees, and the Standing Committee should defer to the advisory committees. The Standing Committee focuses on the integrity of the process. It looks to the Judicial Conference, the Supreme Court, and the Congress.

Reacting to issues and concerns in a good sense is the proper role of the committees.

Garwood I would be less than enthusiastic about restyling the civil rules. The civil advisory committee has important issues pending before it, such as class actions and simplified civil procedures. It would be too much of a burden for the committee to take on the style project.

I agree with Geoff Hazard on his fourth point – that the rules committees should not get into certain areas. We must distinguish between those controversies arising between judges or lawyers – which are perfectly fine to address – and those matters that are controversial with the Congress – which we should avoid.

There is a placed for both reactive and pro-active approaches. In being pro-active, we are simply responding to general needs. If the bar tells us that they are having problems with the rules, we need to respond.

Hazard The distinction between pro-active and reactive is not helpful. It is really a question of which course of action the committees should take among many that could be taken.

Restyling is very helpful. But it must be divorced from substantive changes as a different path.

There have been changes in litigation, and it is now a common means for transforming social policy. The legislature drafts imprecise statutes and leaves it up to the courts to interpret and fill gaps.

There has also been a transformation of the bar and the elite of the bar. The bar associations and other elite sections of the bar are losing influence in lawmaking.

Higgin. The district courts are becoming less and less trial courts. The data show that there are fewer trials. There are wholesale delegations to magistrate judges and a huge movement towards mediation and the use of arbitration clauses. The rules, however, address a vision of trial courts that is simply different from the emerging reality.

Congress refused to sanction 6-person juries in civil cases, but the judges did it on their own. The Judicial Conference rejected our proposed amendments to return to 12-person juries in civil cases, even though all the research showed that 6-person juries are simply not as good. This was a profound change.

Garwood In restyling, we ran into many cases where the proposed changes in the rule raised substantive concerns. There will be a higher risk of unintentional substantive changes in the civil rules.

Niemeyer Today, ,any corporations and professionals keep their business records and have procedures with a view towards possible discovery.

Our rules process has become more political. We now have lobbyists attending civil rules committee meetings on a regular basis.

Smith With regard to committee notes, they are a joint responsibility of the advisory committee and the Standing Committee. I have no problem with that.

But I do have a concern with the rule that we cannot change a note unless the text of a rule is changes. I do not understand this policy. The notes could play a larger role in bridging gaps and updating the law.

Carnes The restyling process has an enormous cost, as there were 16 people with 14 meetings and a good deal of travel. We learned several lessons in the process:

You cannot restyle the rules in batches. We had to keep going back to earlier rules. We had to tinker at several stages with the definitions.

The style experts need to do their work up front in the beginning.

We divided into two subcommittees. It worked very well.

You must keep a running, written record of all the style conventions that you adopt.

We tried to handle making inadvertent substantive changes. We put a note to each rule stating that no changes were intended, and that the changes were purely stylistic, except where specifically described. That works well.

Schlueter Most importantly, we set a tough schedule, and we stuck to it.

We hired Professor Steve Saltzburg as a special consultant.

Our number one priority was restyling, not rewriting the rules. We did not allow ourselves to get bogged down. Any time we discovered a substantive issue, we deferred it or assigned it to a subcommittee or individual expert to research.

John Rabiej managed the files and keep the up-do-date set of rules.

We also separated into two packages – a style package and a substantive package. Thus, if some substantive changes drew fire or were rejected, the style package would still fly.

Kimble We should restyle the civil rules. I agree with Judge Carnes and Professor Schlueter that sticking to the tight schedule was extremely important. Also, I agree that the style subcommittee should be involved up front and work closely with the reporter.

You cannot let yourself be paralyze by the fear of making inadvertent substantive changes. Otherwise, there could never be any progress. The restyling process will inevitably turn up ambiguities and inconsistencies.

The product of restyling speaks for itself. Take a look at the side-by-side old and new versions of Civil Rule 27 in the agenda book. The results are obvious in both clarity and consistency.

Ed Cooper When the Style Subcommittee was first formed, Judge Sam Pointer volunteered to proceed with restyling the civil rules. Bryan Garner redrafted all the rules, and Judge Pointer revised the Garner draft. So there is an extant version of restyled rules. Judge Keeton says that he uses it in preference to the regular rules.

In going through the restyling process for the civil rules, we found that we simply could not tell what several of the rules meant.

Can you revise all the rules at one time? The public comment period is enormously valuable. It would be very difficult to get the full value of the public's input if we were to lay on them a complete set of all the civil rules at one time, even if we had a comment period of a year.

Every rule has its own constituency, and they would probably address the problems in their rules. But it would be a huge task for anyone to look at all the civil rules at one time.

In addition, the advisory committee must continue with its other work. We should not attempt to divide into separate style and substantive subcommittees. We need to look at each rule for both. But if we proceeded in batches of rules, it would be easier to make needed substantive changes in the rules.

On balance, restyling would be an enormous undertaking with great benefits.

Coquillette The Chief Justice has made two points:

1. The civil rules should be restyled only after the appellate and criminal rules have been restyled successfully.

   We have now done this, with successful revisions.

2. We should not restyle the evidence or bankruptcy rules.

Kimble The drafting of a set of rules must be done at one time, even though you may choose to publish the revised rules in batches.

Schreiber I have two reservations:

1. Changes in the rules impose a cost on practitioners, especially for books.

2. Precedent is important. Every word in the present civil rules has been interpreted by the courts in case law.

The rules are divided into twelve parts as it is. You could decide to restyle the rules a section at a time.

Coquillette Topic - Committee notes and their role.

Stotler (1) The two "eternal" rules - (1) Because the text may be amended by the standing committee, the notes must be changed also. Thus the notes are the product of both the advisory and standing committee. (2) There can be no change in the committee note when there is no change in the rule itself. This averts problems of attorneys being blind sided by note changes.

Dan Capra wrote a paper for the bar explaining where the committee notes are out of sync with the text of the rules. See Appendix 4 to Tab 13. The paper was done under the aegis of the Federal Judicial Center, rather than as a committee publication. This is because of these two internal rules.

These are internal rules of the committee and are not cast in stone and could be changed.

(2) Judge Thrash has said that the committee notes have become too long and cite to many cases and may cite cases that become out of date. So should the notes be shorter.

(3) Is there something else that the reporters need to do regarding committee notes.

Garwood The two rules are solid. The standing committee may make changes in the advisory committee notes. Notes should not be changed without rule changes because they are a sort of legislative history.

Smith I have no problem with the concept of a committee note, rather than an advisory committee note. But I am opposed to the second rule re changing notes when the rule is not changed. Some of the notes are wrong from the start. The Evidence Rules notes were never consistent. Also new cases come down and case law interprets the rules. The notes are not binding, and changes in them would be of value to practitioners.

Niemeyer It depends on what the note says. Some notes provide an explanation, such as overturning an opinion or implementing a new statute. But some notes elaborate on the text of the rule. Then later the committee comes back and changes the notes at a later point. It is changing the substance without going through the same process.

Committee notes are by the reporter. They should be short and should not add substance.

Shadur I disagree. The notes are extraordinarily valuable by giving the bar assistance in dealing with the rule. Experience and time will show that the longer notes are valuable for the bar.

Nobody knows about the FJC document. It would be easier to have a self-contained document. It is better for the notes to give help. Consideration should be given to Fern Smith's suggestion that we drop the rule forbidding changes in notes without changes in the rule.

This was not the best way to do it.

Capra The notes are the subject of significant attention in both the committee and among the bar. Half the comments are addressed to the notes. And several commentators suggested changes in the notes.

Niemeyer Our class action notes were very full and explanatory. But I do not remember the committee itself spending a great deal of time on the notes. I don't remember the committee ever voting on a note. Members would just make suggestions for insertions and deletions.

Maybe we need to address the role of the note itself. Does it just explain the basis for the change or does it elaborate and give guidance.

Smith The notes could clarify without making an actual change in the rule.

The rule that you can never change the note is perhaps a bit too strict. Exceptions might be made in appropriate situations. We would have to address what is the function of the notes. It is a potential vehicle that might be useful in some cases. The rule should not be absolute.

Scirica There is a Rules Enabling Act problem. When we pass a rule with a note, it is passed along to the Conference, Supreme Court, and Congress. What process

would we employ if we were just changing a note? Would it go all the way, as with the rules themselves.

If it involves a reinterpretation of the rule, is it evading the oversight of the three bodies? The Enabling Act concerns were the basis for the rule.

Stotler There is also a vacuum when Congress changes the rules directly and leaves the notes alone. We might consider pulling the committee notes in such a circumstance. The notes are essentially the committee's legislative history.

E. Cooper Changing a note without changing a rule could be done by republishing the rule as is with a new note. But that would be reenacting the rule. There is no process for enacting a note. It is not approved by the Conference, Court, or Congress. Our traditional reading of the statute is correct that we cannot do it.

Capra By changing the note, you do not necessarily change the rule. You just explain what the committee intended to do.

Niemeyer Could a subsequent committee change the note of a former committee?

Capra The intent is very limited – just to change a note when something has become outmoded or incorrect.

Cecil In West and other publications, it is followed by additional commentary, such as that of Capra. The reporter commentary could do the job. We could try to do it out by asking West to publish Capra's work in appropriate places.

Schlueter The Conference procedures specify that every amendment shall be accompanied by a note explaining, etc. The function of the note is simply to explain to the Conference and others what is intended. It is not the appropriate function to keep the notes up to date. The public could begin to rely on the committees to keep the laws up to date.

We include things in the committee note explaining why the rules are being changes. When you try to explain in detail, you are on tenuous ground. The notes should never be changed. That is not the role of the committee notes. The publishers could do something else.

The notes should be lean and mean.

Thrash I am concerned about use of the committee notes as substitute rule-making. I see a trend towards putting all the controversial stuff in the notes and not in the text of

the rules. I am also concerned about our ability as a committee to review the notes in detail. We meet twice a year and only consider the rule changes in June. We do not have the time to pour over the notes and read the cases. I am concerned about our ability to perform an educational function. That is a better role for the Federal Judicial Center. Many of the notes are guides for the bar, rather than explanations for the changes.

Higgin. The note has got to be limited to what is in the black letter of the text and should explain the purpose of the amendment. It should be tethered to text, confined, and as short as possible. It speaks as of that moment in time. If you undertake more than that you undertake a task to revise. The Rules Enabling Act does not contemplate this.

E. Cooper If a rule gets revised after the committee work is done, the only explanation needed is that something happened later outside the committee process.

The civil advisory committee continually argues about the length and purpose of the notes. One of the recurring themes at the Chicago conference was specific comments on the notes, rather than the text. They get lots of attention. They ask whether the notes are too long, whether they should be relegated to the manual, etc.

First, the role of the note depends on what we are trying to do with the rule. In some cases, you need to say very little. But we sometimes try to write rules that incorporate good practices in the courts. This requires a different kind of note, explaining what is going on in the courts. The 1993(?) changes are replete with references to cases and local practices.

The advent of the electronic era means that the full legislative history – the committee minutes, eventually the agenda items, as well as the committee notes – will all be available and will be used by attorneys. The committee note can at least begin a function of saying how those discussions have been resolved. You can see all kinds of discussions in the minutes, etc., but the clear resolution is in the note itself.

There is a subsidiary problem of balancing the educational and explanation functions in the notes. The letter from the chair to the standing committee is another source of explanation. So, the problem is more complex and cannot be resolved easily. It simply requires continuing attention.

Scirica There is a role for treatises in the area as well. Practitioners need to consult the treatises as well as the rule books. We should continue to be very sensitive to the concerns.

Garwood We had a change in the appellate rules recently to correct an erroneous committee note.

Coquillette Throw it open on the last two topics – technology and simplified civil procedures.

Smith Brief comment on technology. We have somebody at the Center now who is developing a reputation on electronic discovery. He is besieged with requests from courts and other groups for speeches and discussions. The issue is very, very important to many people. Litigants are puzzled and judges do not know enough about computers to feel comfortable in making rulings. I am glad that it is on the radar screen.

Lafitte We are not yet at the point where we see the need for rules changes in the area of computer generated discovery. The privacy issue is very important, and will keep changing. It is not a static situation. Judge Shadur pointed out that there will be an increased use of protective orders to resolve privacy concerns. It could have an impact on the work of judges. But it has not been a problem so far in the pilot courts, and we were surprised to hear it.

Niemeyer The civil rules committee looked at this issue over the course of several meetings and conferences. If you consider an e-mail communication as a document, the problem becomes readily apparent. Technology moves through phases every several years, and the old systems are no longer used and remain in warehouses and backup systems. We might need at some point to consider what is a document, when is it created, and when it is deleted. There is substantial cost in retrieving old computer records.

Higgin. There is no true delete button today. That is the problem.

On a positive note, the benefits of creating a system where all the documents are in electronic form and can be put on a disk helps efficiency. On an appellate panel today, only the author of an opinion has the record. With computerized records, however, all three judges will have the record. I would encourage the rules committees to do what is necessary to facilitate electronic records. They will help the courts deliver justice.

Capra A big part of the agenda for the technology committee will be to monitor electronic filing. We will report routinely.

With regard to electronic discovery, we had a conference at Brooklyn Law School. Every judge there argued against any changes. They said that the existing rules are just fine. But many of the practicing lawyers felt that some changes were in order.

Coquillette Dan Capra will continue to work on technology issues.

Garwood There is no time for all three judges on an appellate panel to read the entire record. You have to trust your colleagues. If I have a problem, I ask the author judge for parts of the record or transcript to clear up any doubts.

Carnes The Southern District of Florida has a pacer system in which they scan in every document in every case. If there is a dispute on the briefs, we can call up the documents from the district court. But the transcript is not presently available, probably because of the court reporters.

Our court asks for the disk containing the briefs of each side. You can carry those on your laptop. You can do a word search.

C. Cooper I had a case where the parties worked together to produce a CD Rom containing the entire record. It has hyperlinks from citations in the briefs to the transcripts and other underlying documents.

Niemeyer It is a bit of a slap in our faces when people tell us that they cannot afford to litigate in our courts. The use of arbitration clauses is growing, and there is growing use of mediation. A lot of people might use the system if we did not have some many rules and requirements. This is very troubling. Why can't we have people come before a judge quickly and make their cases and get a decision?

Our proposal addresses who would be eligible for these procedures. It could rely on consent and on dollar limits. We were exploring various possibilities. We started marketing it to district judges and others, and we received excitement and enthusiasm from everyone. I don't know where it is now.

E. Cooper The most important question for the civil rules committee is to know how much enthusiasm there is in the standing committee for proceeding. It could be a very long term undertaking. The draft does not try to create a new stand-alone set of rules. Rather, it is an add-on to the civil rules. This made it easy to draft, since it refers to the civil rules. But it also makes it clear that these are not rules that will help pro se litigants at all. That would be a separate project, if we were ever to undertake it.

To what cases should these rules apply? One possibility would be to create the incentives that make if desirable for litigants. If there is consent, we can be much more free wheeling. Judge Schwarzer would abolish jury trials.

Should we put it on the side burner or take it up again? Minnesota has a local program along these lines. The experience so far is that most people think that their case is too important for the sleek proceedings. So there is very little use.

Scirica I became a convert to restyling after the Sea Island meeting, but we need to consider the views of those who have been through the process, such as Judge Carnes and Judge Garwood. But it will be a major undertaking, and we need to discuss it with Judge Levi. It would be ultimately worth doing. The experience of the criminal rules committee is very impressive.

LONG-RANGE PLANNING

Agenda Item 14

Rabiej The chairs of the Judicial Conference Committees meet at every Conference to consider long range planning issues. The group identifies subjects that have cross-cutting impact. They would like each committee to consider and identify upcoming events and issues that may impact on their area.

Possible issues - electronic and technology, class actions, cost of litigation and decline of trials. Local rulemaking.

Fitzwater Having less than unanimous verdict in civil cases.

Scirica I assume that we have authority to draw something up.

JUDICIAL CONFERENCE COMMITTEE SELF-EVALUATION FORM

Agenda Item 15

FUTURE COMMITTEE MEETINGS

The next meeting of the committee is scheduled for June 10-11, 2002, in Washington, DC.

Tentative for following meeting - January 9 and 10, 2003.

Scirica Some have suggested that we should have our meetings later in January. We will check with you and may move the meeting dates back.

Thank the staff.

Respectfully submitted,

Peter G. McCabe