

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 met on January 15-16, 2004.

Robert D. McCallum, Associate Attorney General, attended the meeting on behalf of the Deputy Attorney General, James B. Comey. All the other members attended.

Representing the advisory rules committees were: Judge John G. Roberts on behalf of Judge Samuel A. Alito, chair of the Advisory Committee on Appellate Rules, and Professor Patrick J. Schiltz, the Advisory Committee's reporter; Judge A. Thomas Small, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Lee H. Rosenthal, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Edward E. Carnes, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Jerry E. Smith, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Judge Anthony J. Scirica, immediate past Committee chair; Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office; Robert P. Deyling, attorney advisor in the Administrative Office; Professor

NOTICE

**NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL
CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.**

Steven S. Gensler, Supreme Court fellow at the Administrative Office; Joe Cecil of the Federal Judicial Center; and Professor R. Joseph Kimble, Joseph F. Spaniol, and Professor Geoffrey C. Hazard, consultants to the Committee. In addition, representatives from several major bar groups and other legal organizations attended the meeting, including Francis H. Fox, Esquire, on behalf of the American College of Trial Lawyers, Director Lance M. Liebman on behalf of the American Law Institute, Robert S. Peck, Esquire, on behalf of the Association of Trial Lawyers of America, Patricia Lee Refo, Esquire, on behalf of the Litigation Section of the American Bar Association, and Professor William Henning on behalf of the National Conference of Commissioners on Uniform State Laws.

FEDERAL RULES OF APPELLATE PROCEDURE

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

Proposed amendments to Rules 4, 26, 27, 28, 32, 34, 35, 45, and new Rules 28.1 and 32.1 were published for comment in August 2003. More than 120 comments have been submitted on the proposed amendments and new rules as of January 15, 2004. Most of the comments were sent by judges and lawyers in the Ninth Circuit and raise concerns with proposed new Rule 32.1. The proposed new rule would require courts to permit the citation of opinions, orders, or other judicial dispositions that have been designated as “not for publication,” “non-precedential,” or the like. The proposal expressly takes no position on whether these opinions have any precedential value. A few comments have also been submitted on the proposed amendments to Rule 35(a), which would resolve an inter-circuit conflict regarding the make-up of the vote for a hearing or a rehearing en banc. To ensure that the rule is being applied uniformly, disqualified judges would not be counted in the “base” under the proposal in determining whether a “majority” of the circuit judges voted in favor of an en banc hearing.

The public hearings on the proposed rules amendments were canceled. The six persons requesting to testify agreed to appear before the advisory committee at its April 2004 meeting. The advisory committee will consider their testimony and all written comments submitted on the proposed amendments at the meeting.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules proposed amendments to Rule 5005(c) and Rule 9036 with a recommendation that they be published for public comment. Under the proposed amendment to Rule 5005(c), the clerk of the bankruptcy appellate panel is added to the list of officers who can transmit erroneously delivered papers to the clerk of the bankruptcy court. The proposed amendments to Rule 9036 eliminate the requirement that the sender of an electronic notice obtain confirmation that the transmission was received. No confirmation is required under the Federal Rules of Civil Procedure. Most Internet services have stopped providing notifications confirming receipt of messages sent electronically. Moreover, electronic transmissions have attained a level of reliability equal to correspondence by mail, undercutting the justification for separate confirmations. Electronic notice is complete upon transmission.

The Committee approved the recommendations of the advisory committee to publish the proposed amendments to Rule 5005(c) and Rule 9036 to the bench and bar for comment.

Informational Items

Proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006 were published for comment in August 2003. A public hearing on the proposed rules amendments was canceled because no one asked to testify. At its March 2004 meeting, the advisory committee will consider written comments submitted on the proposed amendments.

The Director of the Executive Office for United States Trustees proposed several rules amendments that require a debtor to submit additional documentation regarding income and the debtor's attorney to disclose additional information regarding other legal services provided to the debtor. The proposals were circulated to a select audience and generated a significant number of adverse comments, primarily asserting that the additional documentation is unnecessary, often unavailable, and too burdensome. A subcommittee will hold a focus group meeting with representatives of interested legal and consumer organizations to discuss the proposals.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Rules 16 through 37 and 45 (except Rule 23, which will be handled separately) with a recommendation that they be published for public comment. The Committee earlier approved publication of amendments to Rules 1 through 15. The proposed amendments are part of a comprehensive style project to clarify the civil rules, improve and modernize expression, and remove inconsistent uses of words and conventions. The style project follows up on the comprehensive revision of the Federal Rules of Appellate and Criminal Procedure.

The proposed amendments are not intended to change the meaning of the rules substantively. A separate package of proposed amendments addressing a modest number of non-controversial substantive amendments is being considered to accompany the style proposals. Typical of these non-controversial amendments are proposals accounting for technological changes, *e.g.*, adding a reference to an e-mail address on filing papers.

The Committee approved the recommendations of the advisory committee to publish the proposed rules amendments to the bench and bar for comment. The advisory committee will continue to consider “global” drafting conventions addressing similar, but not identical, words and

phrases that are used inconsistently in the rules. It may report further on these rules at the June 2004 meeting.

Informational Items

Proposed amendments to Rules 6, 24, 27, 45, and new Rule 5.1 and proposed amendments to Admiralty Rules B and C were published for comment in August 2003. A public hearing on the proposed rules amendments was canceled because no one asked to testify. At its April 2004 meeting, the advisory committee will consider written comments submitted on the proposed amendments.

The advisory committee is involved in several major projects. It continues to study issues arising from discovery of computer-based documents. A conference at the Fordham School of Law with over 120 experienced lawyers, judges, academics, and computer experts will be held on February 20-21, 2004. The conference participants will consider whether the civil rules should be amended to accommodate electronic discovery and, if so, what such amendments might be. Different versions of possible amendments have been circulated to conference participants, and their reactions will assist the advisory committee in evaluating these issues.

On a related subject, the advisory committee for the past twelve months has been examining courts' practices in sealing settlement agreements. Senator Herb Kohl had introduced legislation that would require a court to make specific findings before settlement agreements can be sealed (Sunshine in Litigation Act of 2003, S. 817, 108th Cong., 1st Sess.). Early in 2003 Senator Kohl requested the Judicial Conference to study the need for a rule amendment to address this issue. At the request of the advisory committee, the Federal Judicial Center undertook an empirical study of sealing settlement practices in nearly half the district courts. The Center has nearly completed the study. A letter from Director Mecham, Secretary to the Judicial Conference, was sent on December 16, 2003, advising Senator Kohl of the study and its

preliminary findings, which show a very low incidence of settlement agreements sealed by court order.

The advisory committee also continues to make steady progress in drafting a new forfeiture rule that consolidates the forfeiture provisions now scattered throughout the Admiralty Rules and adds new provisions.

FEDERAL RULES OF CRIMINAL PROCEDURE

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

Proposed amendments to Rules 12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59 were published for comment in August 2003. A public hearing on the proposed rules amendments was canceled because no one asked to testify. At its May 2004 meeting, the advisory committee will consider written comments submitted on the proposed amendments.

The advisory committee is considering amendments to Rule 29 proposed by the Department of Justice that would require a judge to defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. Under the present rule, a judge's ruling on a judgment of acquittal motion is rendered unappealable if made before the return of the jury verdict because of the Double Jeopardy Clause. Although the number of these rulings made before a jury verdict is relatively small, the Department asserts that some of the rulings are clearly erroneous and should be subject to appellate court review and correction.

The advisory committee approved the proposed amendments to Rule 29 in principle, subject to further study and to revision addressing situations in which an early dismissal might be prudent, such as those involving a deadlocked jury or a multi-count indictment. Administrative Office staff continues to research court records to document the number of times Rule 29 motions

have been granted before a jury verdict and the factual context, including whether the grant was to fewer than all counts of a multi-count indictment or came after the jury deadlocked.

In accordance with its responsibilities to review all rules amendments proposed by the bench and bar, the advisory committee reconsidered proposed amendments to 12 rules that had been discussed at past meetings and for which final decision had been reserved. The advisory committee determined that none of the proposals should be approved.

FEDERAL RULES OF EVIDENCE

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

As part of its ongoing responsibility to monitor the rules, the advisory committee must consider all suggestions transmitted to it to amend the rules. At its November 2003 meeting, the advisory committee considered and rejected the following suggestions to amend:

- (1) Rule 607: to codify case law that prohibits a party from calling a witness solely to impeach that witness with evidence that is otherwise inadmissible.
- (2) Rule 613(b): to require the laying of a foundation to admit a prior inconsistent statement at the time the witness testifies.
- (3) Rule 704(b): to limit its coverage to the expert testimony of mental health professionals.
- (4) Rule 801(d)(1)(B): to expand the hearsay exception for prior inconsistent statements to cover every statement that would be admissible to rehabilitate the credibility of the declarant-witness.
- (5) Rule 803(18): to explicitly include authoritative publications in electronic form within the learned treatise exception to the hearsay rule.
- (6) Rule 806: to permit extrinsic evidence of a hearsay declarant's bad acts when they are pertinent to the declarant's character for untruthfulness.

The advisory committee declined to proceed with these suggestions in accordance with its established policy of recommending rules amendments only if absolutely necessary. The advisory

committee abstained from action on the suggestions as proposed because they applied only in a limited number of situations or the existing jurisprudence has developed ways to handle the problems raised by them.

The advisory committee decided that proposed amendments to several rules warranted further consideration, primarily because the courts of appeals were interpreting these rules inconsistently. The advisory committee will continue to review proposed amendments to: Rule 404(a) to clarify that character evidence is never admissible to prove conduct in a civil case; Rule 408 to limit the rule's protection to civil cases, prohibit admission of compromise evidence by way of prior inconsistent statement or contradiction, and prohibit the admission of compromise evidence no matter which party offers it; Rule 606(b) to admit proof of juror statements but only to show that there was a clerical mistake in the reporting of the verdict; and Rule 609(a) to define crimes involving dishonesty or false statement. At the request of the Department of Justice, the advisory committee will also consider amendments to Rule 410 to protect the statements and offers of prosecutors as well as defendants and defense counsel made during guilty plea negotiations.

RULES GOVERNING ATTORNEY CONDUCT

The Committee's Subcommittee on Rules Governing Attorney Conduct continues to monitor legislative developments and discussions on the topic among the Department of Justice, state court representatives, and the American Bar Association.

MODEL LOCAL RULES PROJECT

The Committee was presented with a revised report on the local rules project. The report identifies a limited number of local rules that are clearly inconsistent with the national rules or a federal statute. It also identifies local rules that raise questions but on which reasonable minds can differ as to whether a genuine conflict exists. Individual letters will be sent to the chief judges of

the affected courts advising them of the report's findings. Letters will also be sent to six district courts whose local rules fail to comply with the uniform numbering system as required by the national rules.

LAW-REFORM PROJECTS

The Committee's guest participants reported on various law-reform projects undertaken by their respective organizations involving rules-related subjects, including consideration of discovery, mass torts, and summary judgment issues. The American Bar Association's focus on the decline in jury trials and a significant number of projects relating to transnational projects regulating cross-border activities may be portents of possible future rulemaking. The data collected by these organizations in these projects will be useful to the Committee and will better inform its decision-making.

E-GOVERNMENT ACT OF 2002

In 2001, the Judicial Conference adopted a privacy policy governing public access to appellate, bankruptcy, civil, and criminal case files on the recommendation of the Committee on Court Administration and Case Management (JCUS-SEP/OCT 01, pp. 48-50). Under section 205(c) of the E-Government Act of 2002 (Pub. Law No. 107-347), the Supreme Court is to prescribe rules in accordance with the Rules Enabling Act governing the privacy and security concerns arising from public access to electronic case files. The Act does not impose a deadline to prescribe the rules.

A significant number of case files in the courts can be accessed today by the public through the Internet. That number is rapidly growing as a result of the national deployment of the Case Management/Electronic Case Filing system, which offers courts the capability to accept filings electronically. Under section 205(a) of the E-Government Act, papers filed electronically

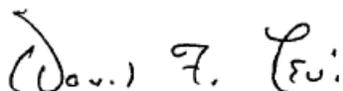
with the court or converted into electronic form must be available to the public on the Internet by April 2007.

The Committee's chair established the E-Government Subcommittee with representatives from each of the advisory rules committees and liaisons from the Committees on Court Administration and Case Management, Criminal Law, and Information Technology. The subcommittee held its first meeting on the morning before the Committee met. The subcommittee was provided background information on the Judicial Conference privacy policy, state-court initiatives, and a Federal Judicial Center study of privacy issues arising from public access to files in criminal cases. At the meeting, the liaisons from the Court Administration and Case Management Committee briefed the subcommittee on the extensive work spanning four years that went into the development of the privacy policy adopted by the Judicial Conference. The advisory committees' reporters will draft proposed rules amendments based on the existing Judicial Conference policy for the subcommittee's consideration.

LONG-RANGE PLANNING

The Committee was provided a report of the September 22, 2003, meeting of the Judicial Conference's Committee chairs involved in long-range planning.

Respectfully Submitted,



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