Agenda E-19 (Summary)
Rules
March 2016

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

Delegate authority to the Advisory Committee on Bankruptcy Rules to implement non-substantive, technical, or conforming amendments to the Bankruptcy Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference ..... pp. 5-6

The remainder of this report is submitted for the record and includes the following items for the information of the Judicial Conference that do not require action:

Agenda E-19
Rules
March 2016

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 7, 2016. All members attended except that Elizabeth J. Shapiro attended on behalf of Deputy Attorney General Sally Quillian Yates.

Representing the advisory rules committees were Judge Steven M. Colloton, Chair, and Professor Gregory E. Maggs, Reporter, of the Advisory Committee on Appellate Rules; Judge Sandra Segal Ikuta, Chair, Professor S. Elizabeth Gibson (by telephone), Reporter, and Professor Michelle M. Harner, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge John D. Bates, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Donald W. Molloy, Chair, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; Judge William K. Sessions III, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Daniel R. Coquillette, the Committee's Reporter; Professor Geoffrey C. Hazard, Jr., Professor R. Joseph Kimble, and Professor Bryan A. Garner, consultants to the Committee; Rebecca A. Womeldorf (by telephone), the Committee's Secretary; Scott Myers, Bridget Healy (by telephone), and Julie Wilson (by telephone), Attorneys on the Rules Committee Support Staff; Derek Webb, Law Clerk to the Committee;

Amelia Yowell, Supreme Court Fellow; Dr. Tim Reagan of the Federal Judicial Center; Judge Philip R. Martinez, Member, and Sean Marlaire, Attorney Advisor, Judicial Conference Committee on Court Administration and Case Management; Judge David G. Campbell, immediate-past Chair, Advisory Committee on Civil Rules and Chair of the Pilot Projects Subcommittee; Judge Robert Michael Dow, Jr. (by telephone), Chair of the Rule 23 Subcommittee, Advisory Committee on Civil Rules; Judge Scott M. Matheson, Jr. (by telephone), Chair of the Appellate-Civil Subcommittee and Member of the Advisory Committee on Civil Rules.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules submitted proposed amendments to Appellate Rules 28.1(f)(4), 31(a)(1), and 41 with a request that they be published for comment at a suitable time. The Committee approved the advisory committee's recommendation.

Rules 28.1(f)(4) and 31(a)(1)

Appellate Rules 28.1(f)(4) (cross-appeals) and 31(a)(1) (appeals) give parties 14 days after service of certain response briefs to file a reply brief. In addition, Rule 26(c) provides that "[w]hen a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire." Accordingly, parties effectively have 17 days to file a reply brief. Pending amendments to Rule 26(c) will soon eliminate the "three-day rule," thus reducing the effective time for filing a reply brief from 17 days to 14 days.

The advisory committee concluded that effectively shortening the period from 17 days to 14 days could adversely affect the preparation of useful reply briefs; therefore, Rules 28.1(f)(4) and 31(a)(1) should be amended to extend the period for filing reply briefs. The proposed

amendments extend the time period to 21 days, in keeping with the established preference for measuring time periods in increments of seven days.

Rule 41

Appellate Rule 41(b) provides that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," but also provides that "[t]he court may shorten or extend the time." Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively "stays the mandate until disposition of the petition or motion." A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed."

In light of issues raised in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), the advisory committee determined that Rule 41 should be amended (1) to clarify that a court must enter an order if it wishes to stay the issuance of the mandate; (2) to address the standard for stays of the mandate; and (3) to restructure the Rule to eliminate redundancy.

Before 1998, Rule 41 referred to a court's ability to shorten or enlarge the time for the mandate's issuance "by order." The phrase "by order" was deleted as part of the 1998 restyling. The change has caused uncertainty concerning whether a court of appeals can stay its mandate through inaction or whether a stay requires an order. A proposed amendment to Rule 41(b) would specify that the mandate is stayed only "by order." Requiring stays of the mandate to be accomplished by court order will provide notice to litigants and facilitate review.

The amendments to Rule 41(d) simplify and clarify the standard pertaining to issuance of a stay pending a petition for a writ of certiorari to the Supreme Court. The deletion of subdivision (d)(1) is intended to streamline the rule by removing redundant language; no substantive change is intended. Subdivision (d)(2)(D)—which would become subdivision (d)(4)—would be amended to specify that a mandate stayed pending a petition for certiorari must issue immediately once the court of appeals receives a copy of the Supreme Court's order denying certiorari, unless the court of appeals finds that extraordinary circumstances justify a further stay. In *Schad* and *Bell*, without deciding whether the current version of Rule 41 provides authority for a further stay of the mandate after denial of certiorari, the Supreme Court ruled that any such authority could be exercised only in "extraordinary circumstances." *Schad*, 133 S. Ct. at 2551. Because a court of appeals has inherent authority to recall a mandate in extraordinary circumstances, *Calderon v. Thompson*, 523 U.S. 538, 550 (1998), the amendment to subdivision (d)(2)(D) makes explicit that the court may stay the mandate after the denial of certiorari, but only in extraordinary circumstances.

Relatedly, a proposed amendment to Rule 41(b) would establish that a court may extend the time to issue the mandate after a denial of certiorari only "in extraordinary circumstances" or pending a petition for certiorari under the conditions set forth in Rule 41(d). The "extraordinary circumstances" requirement is based on the strong interest of litigants and the judicial system in achieving finality. The proposed amendment would apply the "extraordinary circumstances" requirement both after a denial of certiorari and when no party petitions for a writ of certiorari, because the strong interests in finality counsel against extensions unless a heightened standard is met.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Request for a Limited Delegation of Authority

The Advisory Committee on Bankruptcy Rules recommended a delegation of authority to implement non-substantive, technical, or conforming amendments to the Bankruptcy Official Forms, subject to retroactive approval by the Standing Committee. The Standing Committee agreed with the advisory committee's recommendation. Discussion of any delegated actions taken by the advisory committee and retroactively approved by the Committee will be included in the regular reports of the Committee to the Judicial Conference.

The forms-driven nature of bankruptcy practice elevates the potential significance of form errors or glitches, the negative effects of which can be best reduced by prompt action to correct the issue at hand. Under the multi-year Forms Modernization Project, by December 1, 2015, virtually all official bankruptcy forms had been replaced by almost 70 completely new official forms. Given the large scope of the project, minor issues inevitably will arise regarding the wording, formatting, or other aspects of the content of some of the new forms. Indeed, several issues have already arisen since the Judicial Conference approved the new forms in September 2015.

Under existing procedures to correct or update an official form, the advisory committee would propose that a necessary change deemed sufficiently minor or technical be approved without publication. Even without publication, this process is lengthy. Approval of the change has to be considered and approved by the advisory committee, the Committee, and the Judicial Conference, a process that can take from several months to more than a year.

To alleviate this delay, the advisory committee recommended a process that would allow it to make needed non-substantive, technical, or conforming changes to the official bankruptcy forms, subject to retroactive notice and request for approval by the Committee and the Judicial

Conference. The Committee agrees with the suggestion and recommends that such a process be approved.[1]

The Committee recognizes that this authority, if granted, must be exercised in a narrow set of circumstances and only for changes that do not affect the substance of a form or the rights or obligations of any entities. Such changes would generally fall into three categories: (1) the correction of typos and punctuation; (2) reformatting to facilitate data capture by a court's case management and electronic case files system (CM/ECF); and (3) non-controversial conforming amendments needed to implement changes in the rules or statutes (such as a renumbering of provisions), or changes in Judicial Conference policies (such as changes in fee amounts). Any such revisions would go before the full Committee for approval in the next regular meeting cycle, and thereafter reported to the Judicial Conference.

Authorizing a process that allows the advisory committee to implement non-substantive, technical, and conforming changes such as those described above, subject to later approval by the Committee and notice to the Judicial Conference, would minimize the adverse effects of leaving a form unchanged and inconsistent with the law under the lengthier current approval process.

> **Recommendation:** That the Judicial Conference delegate authority to the Advisory Committee on Bankruptcy Rules to implement non-substantive, technical, or conforming amendments to the Bankruptcy Official Forms, subject to later approval by the Standing Committee and notice to the Judicial Conference.

[1]Under the Rules Enabling Act, the Supreme Court has the power to "prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under [the Bankruptcy Code]." 28 U.S.C. § 2075. One of the rules prescribed by the Court authorizes the Judicial Conference to prescribe the Official Forms that must be used in bankruptcy cases. *See* Federal Rule of Bankruptcy Procedure 9009. Because the Judicial Conference has the final authority to approve Official Forms, it may also approve a process for making technical, non-substantive, or conforming changes to those forms. Approval of such a process would be similar to authorizing a Conference committee or the Administrative Office to make noncontroversial changes to policies or guidance that the Judicial Conference has approved. *See, e.g.*, JCUS-MAR 15, p. 13 (the Conference authorized the Bankruptcy Committee to make "non-substantive, technical and conforming changes" to guidance for producing tax information).

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rule 3002.1(b) and (e) with a request that they be published for comment at a suitable time. The Committee approved the advisory committee's recommendation.

Rule 3002.1 prescribes several noticing requirements for home mortgage creditors in chapter 13 cases. The rule was enacted to ensure that chapter 13 debtors who maintain mortgage payments over the life of the plan will have the information they or trustees need to make correct payments. Rule 3002.1(b) requires chapter 13 mortgage creditors to file a notice of any change in the mortgage payment amount at least 21 days before payment is due. Subdivision (b) does not, however, provide a procedure for challenging payment changes that are noticed. The advisory committee concluded that it would be beneficial to have a national procedure for raising and determining objections to payment changes.

The proposed amendment to Rule 3002.1(b) would allow a party in interest to file a motion for a determination of the validity of a payment amount change. If no motion is filed within 21 days after the notice is served, the payment change goes into effect. If a payment change is later determined to be inconsistent with the underlying agreement or governing law, the court can adjust future payments to reflect any overpayments made.

The advisory committee also proposed an amendment to Rule 3002.1(b) to provide more flexibility in the application of the provision to home equity lines of credit (HELOCs). The problem that a HELOC creditor faces in complying with Rule 3002.1(b) is illustrated by *In re Adkins*, 477 B.R. 71 (Bankr. N.D. Ohio 2012), in which the creditor sought relief from the notice requirements of Rule 3002.1(b) on the ground that compliance would be "virtually impossible." *Id*. at 72. The bank explained that, because the loan was an open-ended revolving line of credit, its balance was constantly changing. The payment amount could change monthly due to interest

rate adjustments, increased draws on the line of credit, or payments of principal in addition to the finance charges. These frequent adjustments in the payment amount, contended the creditor, would make it especially difficult to comply with the 21-day notice requirement. *Id*.

The *Adkins* court, although sympathetic with the creditor's position, denied the creditor's Motion to Excuse Notice because Rule 3002.1(b) provides no leeway in its application. Unlike numerous other bankruptcy rules, Rule 3002.1(b) does not say "unless the court orders otherwise." *Id*. at 73. The advisory committee's proposed amendment to Rule 3002.1(b) would address the concerns raised in *Adkins* by authorizing courts to modify the requirements of the provision for HELOCs, with the details of an alternative procedure to be developed by local rulemaking or court order.

Finally, the advisory committee proposed a wording change to Rule 3002.1(e). Rather than providing that only a debtor or trustee may object to the assessment of a fee, expense, or charge, the amended rule would expand the category of objectors to any party in interest. This change would parallel the language of the proposed amendment to subdivision (b) and would authorize a United States trustee or bankruptcy administrator to challenge the validity of a claimed post-petition assessment.

Informational Items

As previously reported, at its spring 2011 meeting, the advisory committee began considering the possibility of creating a chapter 13 plan official form. A proposed chapter 13 national plan form and proposed amendments to nine related rules were published for public comment in August 2013. Because the advisory committee made significant changes to the form in response to comments it received, the revised form and rules were published again in August 2014.

At its spring 2015 meeting, in response to comments that were submitted after republication, the advisory committee discussed a number of options relating to the chapter 13 national form and associated rules. Although there was widespread agreement regarding the benefit of having a national plan form, members generally did not want to proceed with a mandatory official form in the face of substantial opposition by bankruptcy judges and other bankruptcy constituencies. Accordingly, the advisory committee voted unanimously to give further consideration to pursuing a proposal that would involve promulgating a national plan form and related rules, but would allow districts to opt out of the use of that form if certain conditions were met.

Following the spring meeting, the advisory committee determined that the opt-out option could be achieved through revisions to Rules 3015 and 3002, as well as a new rule, Rule 3015.1. The advisory committee tentatively approved the rest of the chapter 13 plan package (proposed Official Form 113 and the related revisions to Rules 2002, 3002, 3007, 3012, 4003, 5009, 7001, and 9009), but it has deferred submission of those items to the Committee so that it can further consider the opt-out proposal and the necessity, timing, and scope of any republication, including outreach to various bankruptcy constituencies regarding the opt-out proposal, at its spring 2016 meeting. The Committee approved this approach at its January 2016 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Informational Items

Rule 23

The Advisory Committee on Civil Rules continues to focus on potential amendments to Civil Rule 23. The Rule 23 Subcommittee began its work in 2011 in the light of several developments that taken together seemed to warrant reexamination of Rule 23. These included

(a) the passage of time since the 2003 amendments to Rule 23 went into effect; (b) the development of a body of case law on class-action practice; and (c) recurrent interest in the subject in Congress, including the 2005 adoption of the Class Action Fairness Act.

The Subcommittee began by developing an initial list of possible rule amendments. The Subcommittee members have made presentations about the ideas under consideration at nearly two dozen meetings and bar conferences with purposefully diverse memberships and attendees. On September 11, 2015, the Rule 23 Subcommittee held a mini-conference to gather additional input from a variety of stakeholders on potential rule amendments. Taking all of the above into account, consensus emerged at the advisory committee's November 2015 meeting around a basic outline for proceeding, which identified the following six subjects for rule amendments:

1. Requiring provision of information up front to the court ("frontloading") relating to the decision whether to send notice to the class of a proposed settlement;
2. Making clear that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f);
3. Making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice triggers the opt-out period in Rule 23(b)(3) class actions;
4. Updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions;
5. Addressing issues raised by "bad faith" class-action objectors; and
6. Refining standards for approval of proposed class-action settlements under Rule 23(e)(2).

The Committee endorsed the general direction recommended by the advisory committee, although work remains to be done about how best to approach these topics.

Rule 62

The advisory committee formed a joint subcommittee with the Advisory Committee on Appellate Rules to address Civil Rule 62 matters relating to stays and bonds pending appeal. This joint effort has resulted in a draft of proposed amendments to Rule 62 that will be considered by each advisory committee. The goal is to present a proposal for publication in 2016.

Electronic Filing

The advisory committee continues to consider rules amendments addressing electronic filing and service. The advisory committee has determined that the national rules should mandate electronic filing for parties represented by an attorney, subject to an exception for good cause, and provide for electronic service of the papers. Courts would retain the discretion to permit electronic filing by pro se parties, either through local rule or order. The advisory committee recognizes that the Federal Rules of Criminal Procedure incorporate the civil filing rules by reference, and the Criminal Rules govern matters that raise distinct concerns. As discussed *infra*, the Advisory Committee on Criminal Rules is considering adoption of an independent electronic filing rule to address concerns specific to criminal practice.

Civil Rules Package

The advisory committee continues its work, in coordination with the Federal Judicial Center, to publicize and promote the amendments to the Civil Rules that became effective December 1, 2015 ("Civil Rules Package"). This package of rules amendments was developed over a five-year period with the objective of advancing Rule 1's goal of the just, speedy, and inexpensive determination of every action. The amendments will improve the disposition of civil cases in the federal courts by advancing cooperation among parties, emphasizing the concept of proportionality, and promoting early judicial case management. The Civil Rules

Package also includes a rule that addresses preservation and loss of electronically stored information as well as the abrogation of Rule 84 and the forms appended to the Civil Rules.

Beyond the Civil Rules Package, the Committee continues to study further ways to improve civil litigation, including testing potential innovations through one or more pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed to investigate pilot projects undertaken across the country in state and federal courts, and to recommend possible future pilot projects for federal courts. The advisory committee is coordinating its efforts with the Judicial Conference Committee on Court Administration and Case Management.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Informational Items

At its fall 2015 meeting, the advisory committee formed a subcommittee to consider a suggestion made by the Department of Justice to reconsider the notice requirement regarding organizational victims in Rule 12.4(a)(2). Another subcommittee was formed to consider a suggestion to amend Criminal Rule 15(d), the rule governing who pays for deposition expenses, to address an inconsistency between the text of the rule and the committee note. Both of these subcommittees will report their recommendations at the next meeting of the advisory committee.

Rule 49

The advisory committee continues to consider amendments to Criminal Rule 49. This undertaking was born of a larger inter-advisory committee project to develop rules for electronic filing, service, and notice. As part of that project, the Advisory Committee on Civil Rules determined to pursue a national rule mandating electronic filing in civil cases. That decision required reconsideration of Criminal Rule 49(b) which provides that service "must be made in

the manner provided for a civil action," and Rule 49(e) which provides that a local rule may require electronic filing only if reasonable exceptions are allowed. The subcommittee concluded that such an electronic default rule could be problematic in the criminal context because pro se defendants and pro se prisoners filing actions under §§ 2254 and 2255 rarely have unfettered access to the CM/ECF system and because the architecture of CM/ECF does not permit non-party filings in criminal cases. Therefore, the advisory committee favors severing the link to the Civil Rules governing service and filing and expects to propose at the Committee's next meeting a "stand-alone" Rule 49 that does not incorporate Civil Rule 5.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Informational Items

On August 14, 2015, a proposed amendment to Rule 902 and a proposal to abrogate Rule 803(16) of the Federal Rules of Evidence were published for public comment. The comment period closes February 16, 2016. As previously reported, the proposed abrogation of Rule 803(16) would eliminate the hearsay exception for ancient documents. The proposed amendment to Rule 902, the rule on self-authentication, would ease the burden of authenticating certain electronic evidence. A public hearing on the proposed amendments is scheduled to be held in Washington, D.C., on February 12, 2016.

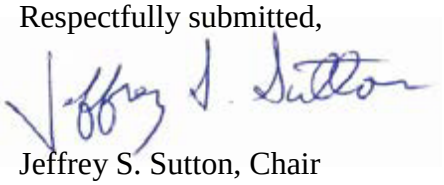
In conjunction with its fall 2015 meeting, the advisory committee held a symposium on hearsay reform. Inspired by a recent appellate decision suggesting the removal of all specific exceptions to the federal rule against hearsay in favor of greater discretion for the presiding judge, the symposium brought together prominent judges, lawyers, and professors to conduct a broad review of the hearsay rule and its exceptions. The symposium considered reform of the

hearsay rule in the context of the electronic information era and discussed various potential amendments to the hearsay rule, and potential drawbacks of such amendments.

JUDICIARY STRATEGIC PLANNING

At its January 2016 meeting, the Committee reviewed the recently updated *Strategic Plan for the Federal Judiciary* with an eye toward answering Chief Judge Riley's call to provide suggestions to the Executive Committee on which strategies and goals outlined in the *Strategic Plan* should receive priority attention over the next two years. Echoing the 2015 Year-End Report from the Chief Justice, the Committee proposes prioritization of Issue 5—Enhancing Access to the Judicial Process—by focusing on educational efforts to implement the Civil Rules Package effective December 1, 2015, which the Committee believes will advance the public's interest in speedy, fair, and efficient justice.

Respectfully submitted,



Jeffrey S. Sutton, Chair

Brent E. Dickson	Patrick J. Schiltz
Roy T. Englert, Jr.	Amy J. St. Eve
Gregory G. Garre	Larry D. Thompson
Daniel C. Girard	Richard C. Wesley
Neil M. Gorsuch	Sally Quillian Yates
Susan P. Graber	Jack Zouhary
William K. Kelley	