

SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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<p>NOTICE</p> <p>NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.</p>
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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 6-7, 2006.

Robert D. McCallum, Associate Attorney General, attended the meeting on behalf of acting Deputy Attorney General Patrick J. McNulty. All the other members attended.

Representing the advisory rules committees were: Judge Carl E. Stewart, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; 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 Susan C. Bucklew, chair, and Professor Sara Sun Beale, 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 Benton J. Campbell, Counselor to Assistant Attorney General, Criminal Division; 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; James N. Ishida, attorney advisor in the Administrative Office; Emery G. Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Federal

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Judicial Center; and Joseph F. Spaniol and Professor Geoffrey C. Hazard, consultants to the Committee. Judge Thomas S. Zilly, chair of the Advisory Committee on Bankruptcy Rules, attended part of the meeting by telephone. Professor Alan N. Resnick, former reporter and member of the Advisory Committee on Bankruptcy Rules, made a presentation on the historical significance of the recently enacted Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-8). In addition, Donald B. Ayer and James C. Duff participated in a panel discussion remembering the late Chief Justice William H. Rehnquist, including his role in the Rules Enabling Act rulemaking process.

FEDERAL RULES OF APPELLATE PROCEDURE

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

Informational Item

A proposed amendment to Appellate Rule 25 was circulated to the bench and bar for comment in August 2005. It would implement the privacy and security provisions of § 205 of the E-Government Act of 2002 (Pub. L. No. 107-347, as amended by Pub. L. No. 108-281), governing electronic filings in court. The scheduled public hearing on the proposed rule amendment was canceled because no one asked to testify. At its April 2006 meeting, the advisory committee will consider written comments submitted on the proposed amendment.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

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

Informational Items

Proposed amendments to Bankruptcy Rules 1014, 3001, 3007, 4001, 6006, and 7007.1, and proposed new Rules 6003, 9005.1, and 9037 were circulated to the bench and bar for comment in August 2005. A public hearing on the amendments was canceled because no one asked to testify. At its March 2006 meeting, the advisory committee will consider written comments submitted on the proposed amendments.

On April 20, 2005, President Bush signed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which generally took effect on October 17, 2005. The six months provided under the law to act was too brief to prescribe conforming amendments to the national rules under the rulemaking process. Accordingly, the advisory committee submitted to the Committee in early August proposed interim rules and amended or new Official Forms necessary to conform with the Act. The Committee reviewed the proposals and recommended that they be adopted. On August 15, 2005, the Executive Committee, on behalf of the Judicial Conference, authorized distribution of the interim rules to the courts with a recommendation that they be adopted by local rule or general order and approved the revisions to the Official Forms. Virtually all courts adopted the interim rules without change.

The advisory committee is monitoring the experiences of the courts with the interim rules and revised forms. It plans to proceed with the regular rulemaking process and propose new national rules based on the interim rules. The advisory committee is also considering other rules amendments to implement the Act, which were not time-sensitive and not included in the interim rules. Under this timetable, proposed rule amendments and any changes to the Official Forms will be published for public comment in August 2006.

The advisory committee thoroughly reviewed the style revision of the Civil Rules. It praised the Civil Rules Committee for the overall quality of the work product and noted only a few instances where bankruptcy-related concerns were implicated.

FEDERAL RULES OF CIVIL PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed an amendment to Civil Rule 8 with a recommendation that it be published for comment. It would delete a “discharge in bankruptcy” from the affirmative defenses listed in the rule. Substantive changes in bankruptcy law have superseded the rule. Section 524(a) of Title 11, United States Code, specifies that a discharge voids any judgment on a discharged claim. The discharge also operates as an injunction against commencing an action or employing process to collect a discharged debt. Therefore, a discharge in bankruptcy is no longer an affirmative defense — which is waivable — but constitutes a fatal flaw in the claim. The judgment is void, and enforcement is barred, even if the debtor defaults or appears and defends without pleading the discharge as an affirmative defense. Because the inconsistency between the rule and the law apparently is not causing problems in practice and the correction is a small one, on recommendation of the advisory committee, publication of the proposal for public comment will be deferred and batched with future proposed rule amendments.

Informational Items

A proposed comprehensive restyling of the Civil Rules was circulated to the bench and bar for comment in February 2005. The revisions are the third set in a project designed to simplify, clarify, and eliminate ambiguities in the federal Appellate, Criminal, and Civil Rules. Approximately 25 comments were submitted on the proposed Civil Rules revision. Two public hearings were cancelled because no one requested to testify. A third scheduled public hearing on

the proposed rules amendments was held at which Professor Stephen Burbank and Gregory Joseph, Esq., spoke on behalf of a group of practitioners and academics who had reviewed the entire set of revised Civil Rules. Professor Burbank and Mr. Joseph expressed the view that the style revisions would lead to unnecessary litigation.

A proposed new Civil Rule 5.2 — addressing privacy and security concerns arising from electronic filing — and revisions to the Illustrative Forms were circulated to the bench and bar for comment in August 2005. The scheduled public hearing on the proposed new rule and form revisions was canceled because no one asked to testify. At its May 2006 meeting, the advisory committee will consider the written comments and oral testimony submitted on the proposed amendments and suggested changes to the published proposals responding to the written comments and oral testimony.

The advisory committee reviewed a lengthy suggestions docket of rule amendments proposed by the bench and bar that has grown over the years and eliminated 33 proposals that were not viewed as promising candidates for further investigation in the near future. The advisory committee retained seven suggestions for further consideration. Among the retained suggestions, the advisory committee is studying proposed amendments to Rule 26(a)(2)(B) to clarify the distinctions between expert trial witnesses who must disclose reports and employees who — because their duties as employees do not regularly involve giving expert testimony — need not disclose reports; Rule 30(b)(6) to address perceived abuses surrounding depositions of organizational witnesses; Rule 15 to clarify procedures governing the amendment of a pleading involving an unnamed and unknown defendant; and Rule 60 to codify the present practice of district courts providing “indicative rulings” pending appeal. The advisory committee is also examining suggested changes to Rule 56 on summary judgment, including changes that overlap

with a project involving all the advisory committees on calculating time periods under the rules, and whether to pursue proposed rules amendments affecting notice pleading.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules proposed amendments to Rules 1, 12.1, 17, 18, 32, and new Rule 43.1 with a recommendation that they be published for comment. The amendments implement the Crime Victims' Rights Act (18 U.S.C. § 3771).

The proposed amendment to Rule 1 incorporates the Act's definition of "crime victim" into the rules.

Amended Rule 12.1 prevents automatic disclosure to the defense of a crime victim's address and telephone number when an alibi defense is raised. The proposed amendment to Rule 17 requires a court order before a subpoena can be issued for personal or confidential information concerning a victim. Rule 18 would be amended to include consideration of a victim's convenience in setting the place of trial.

Several changes are proposed to Rule 32, including adopting the more expansive definition of "crime victim" used in amended Rule 1. The new term applies to all crime victims, not only to a victim of a crime of violence or sexual abuse, as previously defined under the rule.

Proposed new Rule 43.1 incorporates several provisions of the Act, including a victim's right to be notified of, as well as to be heard at, certain judicial proceedings. The Committee discussed whether repetition in the rules of the statutory rights of victims is appropriate.

Traditionally, a rule does not repeat statutory provisions for a number of reasons, including: (1) a rule containing statutory substantive provisions cannot alter the effect of a statutory provision and is unnecessary; (2) any future amendment of the underlying statute will render the parallel rule inconsistent and cause confusion until a corresponding change in the rule is promulgated;

(3) the style conventions used consistently throughout the rules differ from the conventions used in legislation; and (4) any language differences between a statute and a rule may generate litigation. The Committee is interested in receiving public comment on whether the historical reasons against repeating statutory provisions in a rule are offset by benefits that might be derived from the added attention and greater prominence that these statutory provisions may be given if they are set out in a rule. The Committee also renumbered the proposal as a new Rule 59 to highlight its distinctive nature.

Informational Items

Proposed amendments to Criminal Rules 11, 32, 35, and new Rule 49.1 were circulated to the bench and bar for comment in August 2005. The scheduled public hearing on the proposed rules amendments was canceled because only two persons asked to testify. In lieu of testifying at a separate hearing, the two witnesses agreed to submit a statement and appear before the advisory committee's chair and reporter in Arizona, while they were attending the Committee's meeting. At its April 2006 meeting, the advisory committee will consider the witnesses' testimony and written comments submitted on the proposed amendments.

At its June 2005 meeting, the Committee requested that the advisory committee continue studying a proposed amendment to Rule 29 that would permit a judge to enter a judgment of acquittal before a verdict only if the defendant waives Double Jeopardy rights so that the government's ability to appeal is preserved. It also requested that the advisory committee draft such a rule and submit it to the Committee with a recommendation to either publish or not publish it for public comment. The advisory committee continues to study the issue and transmitted a preliminary draft amendment to the Committee for informational purposes. The advisory committee expects to submit at the Committee's June 2006 meeting a final proposal with its recommendation to publish or not to publish.

The advisory committee also is considering a proposed amendment to Rule 16 that would clarify when and what type of exculpatory evidence and impeachment evidence must be disclosed before trial consistent with *Brady* requirements. The Department of Justice submitted a draft revision of its *U.S. Attorneys' Manual* to accomplish the same goals, in lieu of a rule change. The advisory committee expects to make a recommendation on this issue at its April 2006 meeting.

FEDERAL RULES OF EVIDENCE

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

Informational Item

The advisory committee continues its work on a possible rule to be submitted to Congress on waiver of privileges. Unlike other proposed rule changes, an amendment affecting an evidentiary privilege requires the affirmative approval of Congress under the Rules Enabling Act rulemaking process (28 U.S.C. § 2074(b)). The burden and cost of preserving the privileged status of attorney-client information and trial preparation materials can be enormous without deriving any countervailing benefit. Lawyers and firms must thoroughly review every item produced in discovery. Otherwise they risk waiving the privileged status not only of the individual document disclosed but of all other documents dealing with the same subject matter. The advisory committee plans to hold a special meeting and invite experienced lawyers and academics expert in the area to advise it on the extent of the problem and comment on possible solutions.

BANKRUPTCY LAW PRESENTATION

Professor Alan N. Resnick provided a historical account of the development of bankruptcy law and implementing procedural rules, leading up to the enactment of the 2005

Bankruptcy Act. He concluded by summarizing the main parts of the new bankruptcy law, describing the work of the advisory committee implementing the law, and noting possible consequences of the law.

TIME-COMPUTATION PROJECT

The Committee's subcommittee reported on its progress in clarifying and simplifying the time-computation provisions contained in the various sets of federal procedural rules. The subcommittee is working on a model rule to be used in each set of rules that would eliminate the present method of computing time periods involving ten or fewer days to account for weekends, holidays, and days on which the clerk's office is inaccessible. The subcommittee is also considering modification or elimination of the three-day service rule. The rule is rapidly becoming anachronistic in light of the growing use of instantaneous electronic means of transmission. The subcommittee intends to submit its recommendations to the advisory rules committees at their spring meetings. It expects no action to be taken by the Committee until the respective advisory committees have had an opportunity to review time periods contained in individual rules and determine whether any change would be necessary in them to account for the proposed changes in the counting of time.

REPORT ON CLASS ACTION FAIRNESS ACT

Section 6 of the Class Action Fairness Act of 2005 (Pub. Law No. 109-2) required the Judicial Conference to report by February 18, 2006, on actions taken by the Conference to improve the fairness of class action settlements and attorney fees awards in class actions. On January 12, 2006, the Committee transmitted a report to the Executive Committee with a recommendation that the report be forwarded on behalf of the Conference to the Congressional Judiciary Committees in accordance with the Act. The report described the amendments to Civil

Rule 23 (class actions) that took effect in December 2003, which accomplished the tasks assigned to the Conference under § 6 of the Act.

LONG-RANGE PLANNING

The Committee was provided a report of the September 19, 2005, meeting of the Judicial Conference's committee chairs involved in long-range planning.

REMEMBRANCES OF THE LATE CHIEF JUSTICE WILLIAM H. REHNQUIST

Judge Mark R. Kravitz, a former Chief Justice Rehnquist law clerk, led a panel discussion with two private practitioners, Donald B. Ayer, also a former Chief Justice Rehnquist law clerk, and James C. Duff, a former administrative assistant to Chief Justice Rehnquist, on the late Chief Justice's important role, including his support of the Rules Enabling Act rulemaking process. The Committee voted to note on the record its highest regard and respect for Chief Justice William H. Rehnquist and his steadfast support of the rulemaking process.

Respectfully Submitted,

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