

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

This report is submitted for the record, and includes the following items for the information of the Conference:

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- ▶ Federal Rules of Bankruptcy Procedure pp. 2-4
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- ▶ Federal Rules of Criminal Procedure pp. 6-7
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NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL
CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

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 7-8, 2010. All members attended.

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

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office; James N. Ishida and Jeffrey N. Barr, attorneys in the Office of Judges Programs in the Administrative Office; Joe Cecil and Timothy Reagan of the Federal Judicial Center; and Professor Geoffrey C. Hazard and Joseph F. Spaniol, Jr., consultants to the Committee. Deputy Attorney General David W. Ogden attended as the *ex officio* member

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from the Department of Justice. Karen Temple Clagget and Elizabeth J. Shapiro also attended on behalf of the Department of Justice. Chief Judge Anthony J. Scirica, former committee chair and current Executive Committee chair, also participated in the meeting.

FEDERAL RULES OF APPELLATE PROCEDURE

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

Informational Items

The advisory committee is considering coordinated amendments to Appellate Rule 4(a)(1) and 28 U.S.C. § 2107 as well as to Appellate Rule 40(a) to clarify the time for seeking an appeal or a rehearing in a case in which a United States officer or employee is sued in his or her individual capacity.

The advisory committee is coordinating with the Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules (Appeals to District Court or Bankruptcy Appellate Panel). The project will affect practice in the courts of appeals, for example, by addressing procedures for direct appeals from the bankruptcy court to the court of appeals.

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 2003, 2019, 3001, 4004, and 6003, proposed new Rules 1004.2 and 3002.1, and proposed amendments to Official Forms 22A, 22B, and 22C were published for comment in August 2009. One of the two scheduled public hearings on the amendments was canceled. The witness who requested to testify at the first of these two scheduled hearings agreed to a conference call with the advisory committee's chair and reporter

in lieu of a personal appearance. Twelve witnesses asked to testify at the second scheduled public hearing in New York City. The advisory committee will consider the witnesses' statements and all written comments submitted on the proposed amendments at its April 2010 meeting.

The advisory committee is considering a comprehensive revision of Part VIII of the Bankruptcy Rules to align them more closely with the Federal Rules of Appellate Procedure and to reflect the many changes resulting from electronic filing. The advisory committee held a one-day conference at Harvard Law School at which judges, clerks of court, practitioners, and academics addressed these issues.

The advisory committee continues its project to revise and modernize bankruptcy forms. The committee is studying the forms' content to improve clarity. The advisory committee is also studying different approaches to making the forms easier to use and more effective to meet the needs of the judiciary and of those involved in resolving bankruptcy matters, including ways to take advantage of technology.

On December 1, 2009, the time-computation amendments took effect. These amendments simplified the method for calculating deadlines in the Appellate, Bankruptcy, Civil, and Criminal Rules and made the method consistent across the different sets of rules. Most of the time-computation changes either effectively maintained the existing time periods or lengthened the time periods. One of the simplifying changes made was to express time periods of less than 30 days in 7-day increments. To maintain consistency with these changes, 12 bankruptcy rules were shortened from 15 days to 14 days. These changes raised concerns on the part of House Judiciary Committee staff about the effect of shortening the deadlines in these rules, particularly on debtors. To provide additional safeguards against untimely filings and to allay congressional concerns about the shortened time periods in these rules, the advisory

committee sent a memorandum on November 16, 2009, to all chief judges expressing its view that a filing that would previously have been timely but would be one day late under the amended rules should be treated as the product of “excusable neglect” under Rule 9006(1) during a six-month transition period. To reduce the likelihood of untimely filings and the need for extensions, the memorandum also suggested that bankruptcy courts continue their efforts to publicize the time-computation changes and, in particular, that the courts post a conspicuous notice that specifically identifies the rules for which the time periods are reduced by one day.

Revisions of Director’s reaffirmation forms that may be used when a debtor seeks to reaffirm a pre-bankruptcy debt were issued in December 2009. The forms were substantially revised to make them easier to complete and less likely to include mistakes. Both the existing and new revised versions of the reaffirmation forms may be used during a six-month transitional period beginning December 1, 2009.

FEDERAL RULES OF CIVIL PROCEDURE

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

Informational Items

The advisory committee led a discussion on the standards that apply to motions to dismiss for failure to state a claim upon which relief can be granted in light of the Supreme Court’s decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*,

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S. Ct. 1937 (2009), and in light of legislation proposed in the House and Senate to overturn these decisions. The Committee heard a presentation by Professor Robert G. Bone, who has written two thoughtful law review articles on the Supreme Court cases and was invited to give an overview and analysis of the cases. The Committee’s discussion ranged from the lower courts’ application of the Supreme Court decisions, the effect of those decisions on rates of filing of

motions to dismiss and the rates of grants or denials in different kinds of cases, to the continued effectiveness of transsubstantive rules, the interplay between pleading standards and limited discovery, the extent of judicial discretion in dismissing cases, and the implications of different versions of proposed legislation aimed at overturning the Court's decisions.

The advisory committee is planning a major conference on May 10-11, 2010, at the Duke University School of Law. The conference will examine problems in civil litigation in the federal courts and the adequacy of the Federal Rules of Civil Procedure to achieving just, cost-effective, and timely disposition of cases. The conference will address civil litigation issues ranging from pleading, electronic and other discovery, summary judgment, to trials. The advisory committee has commissioned a series of papers from prominent members of the bench and bar. The advisory committee will also hear about empirical studies and surveys from a number of different research and other organizations on discovery and other litigation costs. The conference will examine possible rule changes as well as possible changes in legislation and in judicial and legal education. The conference has generated significant interest and promises to be important.

The advisory committee is considering proposed amendments to Rule 45, dealing with discovery and trial subpoenas. Specific topics include improved notice of document-production subpoenas, coordination between the court where the action is pending and the court from which the subpoena is issued, and the geographic reach of trial subpoenas. The advisory committee also is exploring the possibility that Rule 45 could be simplified by separating three components: all subpoenas are issued by the court where the action is pending; the place of performance is separately designated; and resolution of disputes is allocated between the court where the action is pending and the court where the performance required by the subpoena will take place.

The advisory committee is also reexamining Rule 26(c), which addresses protective orders in discovery. Congress continues to express concerns over the role of protective orders, as reflected in the Sunshine in Litigation Act bills (S. 537, 111th Cong.; H.R. 1508, 111th Cong.) that were introduced in 2009.

FEDERAL RULES OF CRIMINAL PROCEDURE

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

Informational Items

Proposed amendments to Criminal Rules 1, 3, 4, 6, 9, 32.1, 40, 41, 43, and 49, and new Rule 4.1 were published for comment in August 2009. Scheduled public hearings on the amendments were canceled because no one asked to testify. The advisory committee will consider written comments submitted on the proposed amendments at its April 2010 meeting.

The advisory committee continues to consider proposals to codify and expand the government's obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963). A small group of practitioners, academics, and judges shared their views on and experiences with Rule 16 discovery practices at a consultative session held in Houston, Texas, on February 1, 2010. In addition, the advisory committee is reviewing the materials previously submitted in connection with earlier proposals to amend Rule 16. That review has been augmented by materials from the Department of Justice, which has recently adopted a multi-faceted approach to address *Brady* issues, including mandatory training, internal enforcement and leadership, and more consistency in discovery practices across the districts.

The advisory committee is reconsidering proposed amendments to Rule 12 to clarify whether a defendant's failure to raise before trial a claim that an indictment fails to state an offense acts as a "waiver" or "forfeiture" of the right to object for purposes of appeal. The

advisory committee tabled further consideration of proposed amendments to Rule 5, which would require a judge, when deciding whether to detain or release a defendant, to consider the right of any victim to be reasonably protected from a defendant. The advisory committee concluded that both the Crime Victims' Rights Act, 18 U.S.C. § 3771, and the Bail Reform Act, 18 U.S.C. §§ 3141-3156, already address this issue by requiring a judge to consider danger to the community, including danger to any victim, in making release decisions. The advisory committee continues to monitor the effectiveness of the rules implementing the Crime Victims' Right Act, including by receiving reports from the Department of Justice on its regular meetings with crime victims' groups, and to ensure that the views of crime victims' groups on different proposals are fully considered.

FEDERAL RULES OF EVIDENCE

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

Informational Items

Proposed amendments "restyling" the Evidence Rules to make them clearer and easier to read, without changing substantive meaning, were published for comment in August 2009. The Evidence Rules "restyling" project follows the successful restyling of the Federal Rules of Appellate, Criminal, and Civil Procedure. Scheduled public hearings on the Evidence Rules style amendments were canceled. The advisory committee will consider written comments submitted on the proposed amendments at its April 2010 meeting.

The advisory committee continues to monitor cases applying the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 34 (2004), which held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

SEALING AND PRIVACY SUBCOMMITTEE REPORTS

The Committee's Sealing Subcommittee is reviewing the results of the Federal Judicial Center's comprehensive study of sealed cases. The number of cases sealed is relatively low. Most of the sealing orders are required by statute (e.g., *qui tam* actions). The study disclosed that a small number of cases that were initially appropriately sealed remained sealed after the reason to do so had expired because there was no mechanism to bring it to the court's attention. Improvements can be made to minimize the small number of sealing orders that are maintained unnecessarily. The subcommittee is considering developing guidelines for judges and clerks of court, which it plans to submit to the Committee at its next meeting.

The Committee's Privacy Subcommittee is reviewing surveys of judges, clerks of court, and assistant U.S. attorneys on their experiences with the operation of the privacy rules. The preliminary results indicate no general problems with the privacy rules' operation. The subcommittee is continuing to study issues relating to maintaining the privacy of information about jurors and, in criminal cases, about cooperating defendants who plead guilty. The subcommittee is holding a mini-conference at the Fordham School of Law on April 13, 2010, to consider these and other privacy-related issues.

PANEL DISCUSSION ON LAW SCHOOL EDUCATION AND ITS IMPACT ON THE JUDICIARY

A panel consisting of Dean David F. Levi (moderator), Professor Daniel R. Coquillette, Professor Georgene M. Vairo, Professor Tod D. Rakoff, and Dean Paul Schiff Berman discussed with the Committee recent trends in how and what law schools are teaching and the interactions between the judiciary and the academy. The discussion ranged from the academy's training of law clerks to the important role law clerks play in communicating to the public how judges make decisions and the vital role of the judiciary. The panel emphasized the importance of having many opportunities for new graduates to benefit from judicial clerkships.

LONG-RANGE PLANNING

The Committee was provided a draft strategic plan developed by the Ad Hoc Advisory Committee on Judiciary Planning. The Committee found its work and future projects consistent with the proposed judiciary strategic plan.

Respectfully submitted,



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