

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

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

Reconsider its September 1993 position supporting in principle the offer-of-judgment proposal contained in S. 585, the "Civil Justice Reform Act of 1993," and take no position on the legislation at this time. . . . pp. 2-3

The remainder of the report is for information and the record.

NOTICE

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

Agenda F-19
Rules
March 1994

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:

Your Committee on Rules of Practice and Procedure met in Tucson, Arizona, on January 12-14, 1994. All members of the Committee attended the meeting, except Judge George C. Pratt and Alan C. Sundberg, Esquire. The immediate past chair, Judge Robert E. Keeton, and former member, Professor Charles Alan Wright, also attended. Representing the advisory committees were: Judge James K. Logan, Chair, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge Paul Mannes, Chair, and Professor Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules; Judge Patrick E. Higginbotham, Chair, and Dean Edward H. Cooper, Reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, Chair, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; and Dean Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

NOTICE

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Participating in the meeting were Peter G. McCabe, the Secretary to the Committee; Professor Daniel R. Coquillette, Reporter to the Committee; John K. Rabiej, Chief of the Rules Committee Support Office; Professor Mary P. Squires, Director of the Local Rules Project; and Bryan Garner and Joseph F. Spaniol, consultants to the Subcommittee on Style. William B. Eldridge of the Federal Judicial Center also attended the meeting. Chief Judge William D. Browning opened the meeting by welcoming the Committee to the District of Arizona.

I. Offer-of-Judgment Proposal Contained in S. 585

In accordance with a recommendation from the Committee on Court Administration and Case Management, adopted by the Judicial Conference on the September 1993 consent calendar, your Committee reviewed the issue of whether the offer-of-judgment proposal contained in S. 585, the "Civil Justice Reform Act of 1993," was "more appropriately within the authority of federal rules...."

The offer-of-judgment proposal set forth in S. 585 would provide limited attorney fee remedies where a party rejects an offer that proves to be more favorable to it than the eventual judgment. It would have far-reaching implications for the judiciary, the bar, and the public and raises fundamental policy questions on the advisability of movement towards the "British fee-shifting" system. The recommendation adopted by the Conference in September 1993 "supported in principle the substance" of the offer-of-judgment proposal in S. 585 (JCUS-SEP 93, pp. 43-44). The

Advisory Committee on Civil Rules, however, is still considering proposals to amend or delete Rule 68 and concluded that it would be premature to endorse legislative action at this time.

During its last three meetings, the Advisory Committee studied and debated extensively several drafts of proposed amendments to Rule 68, similar to the offer-of-judgment provision set forth in S. 585. In addition, the Committee reviewed a comprehensive paper on the uncertainties surrounding the proposed revision of the offer-of-judgment provision, prepared by the Reporter to the Advisory Committee for use at a recent symposium on the same subject matter at the New York University.

Your Committee agrees with the Advisory Committee that endorsement in principle of the offer-of-judgment proposal in S. 585 is premature. It is complex and controversial; it leaves open many unanswered questions on its actual effect on settlement practices; and it is under active consideration by the Advisory Committee on Civil Rules. It is essentially a civil procedure matter appropriately within the purview of the rules committees. Moreover, the Federal Judicial Center is conducting a study of settlement experiences under Rule 68, which may provide useful empirical data on the issue. Some tabulations will be available in April of 1994.

Recommendation: That the Judicial Conference reconsider its September 1993 position supporting in principle the offer-of-judgment proposal contained in S. 585, the "Civil Justice Reform Act of 1993," and take no position on the legislation at this time.

II. Information Items

A. Facsimile Filing Standards

At its September 1993 session, the Judicial Conference referred to the Committee on Rules of Practice and Procedure, in coordination with the Committees on Automation and Technology and Court Administration and Case Management, for a report to the September 1994 Conference, the question of whether, and under what technical guidelines, filing by facsimile on a routine basis should be permitted.

The chair of your Committee has kept the chairs of the two other respective Committees informed of the action taken by the Advisory Committees and your Committee on this matter.

The Advisory Committee on Appellate Rules devoted a substantial portion of their September 1993 meeting reviewing and revising a draft of the facsimile filing guidelines immediately following the Conference session. Extensive redrafting was later added by the Reporter and individual members of that Committee. The revised draft reorganized the guidelines into: (1) a national set of technical guidelines on equipment, and (2) a set of model local rules governing attorney responsibilities regarding facsimile filing.

The Advisory Committee on Civil Rules later carefully studied the redrafted guidelines. It generally approved the revisions, but favored a more uniform national approach on the procedures to assist members of the bar who practice nationally. The Advisory

Committee on Bankruptcy Rules has continued to oppose unanimously the application of the facsimile guidelines to bankruptcy proceedings for a variety of reasons, particularly the practical consequences on bankruptcy clerks' offices and its outmoded technology. The Advisory Committees on Criminal and Evidence Rules expressed no objections to the facsimile guidelines.

Your Committee considered at length views of the various committees on and the several versions of the guidelines, and it concluded unanimously that facsimile filing should not be permitted on a routine basis. Among the principal problems with routine facsimile filing are the following: (1) the procedures would impose great burdens on clerks' offices; (2) the technical equipment requirements would not be honored by those members of the bar who have obsolete equipment, and it would be difficult to police compliance effectively; and (3) the guidelines may create a trap for members of the bar who rely on last minute filings but are frustrated because others are using the same transmission line.

Your Committee, however, agreed that facsimile filing should be permitted on a non-routine and locally approved basis to reflect actual practices in the courts. Accordingly, it revised the latest draft of the facsimile filing guidelines to facilitate such an approach, and it will furnish the Committees on Automation and Technology and Court Administration and Case Management with copies for their consideration. A report on the results of the coordinated effort will be given to the Conference at its September 1994 session.

B. Consideration of Results of the Study on the Effects of the Civil Justice Reform Act

The Civil Justice Reform Act of 1990 (CJRA) requires the Judicial Conference to report to Congress by December 31, 1995, on the results of demonstration and pilot programs. As part of the report, the Conference must include:

a recommendation as to whether some or all district courts should be required to include, in their expense and delay reduction plans, the 6 principles and guidelines of litigation management and cost and delay reduction identified in section 473(a) of title 28, United States Code.... [and if so] the Judicial Conference shall initiate proceedings for the prescription of rules implementing its recommendation [pursuant to the Rules Enabling Act].

Your Committee and the Advisory Committees want to help and participate in the evaluation of the CJRA studies, particularly as they may implicate potential amendments to the rules of practice and procedure.

The final results of a comprehensive study being conducted by the RAND corporation on the pilot program under CJRA, which will be used as a basis for the Judicial Conference's report, are scheduled to be available in the summer of 1995. Unless earlier information on the fruits of the RAND study is available, however, your Committee is concerned that the scheduled timetable for the Congressional report will be inadequate to allow careful study by the rules committees. Based on available information, your Committee is also concerned that the data generated by the RAND study may not be as useful as necessary to evaluate potential amendments to the Federal Rules of Civil Procedure.

In light of these concerns, your Committee established a small subcommittee to contact the chair of the Committee on Court Administration and Case Management to discuss these matters generally and to seek ways to accommodate the information needs of the rules committees.

C. Local Rules Project

Uniform regulations governing professional conduct of attorneys practicing in federal courts have been proposed in recent legislation and in a Department of Justice initiative. Rules governing attorney conduct have traditionally been prescribed locally based on state codes of professional conduct. Whether it is appropriate to prescribe uniform attorney conduct rules raises fundamental policy issues and significant federal-state comity questions. Your Committee instructed its Reporter to explore the existing local court rules on attorney conduct and admissions, and consider whether there is a justification or need for national uniformity. With the concurrence of the Advisory Committee on Criminal Rules, the Committee also approved compilation of local criminal rules from all districts as had been done with local civil rules.

D. Self-Study of the Rulemaking Process

Your Committee met in executive session on the first day of its meeting to discuss internal operating procedures. The members engaged in a wide-ranging discussion on the rulemaking process, which was actively participated in by the immediate past chair,

Judge Robert E. Keeton, and former member Professor Charles Alan Wright.

The Committee considered recent criticisms on the frequency of rules amendments. It also discussed the growing roles and participation of interest groups, the bar, Congress, and the public in the rulemaking process. Mindful of its responsibilities under section 331 of title 28, United States Code, to carry on a continuous study of the operation and effect of the general rules of practice and procedure, the Committee directed its Subcommittee on Long-Range Planning to circulate to the bench and bar a self-study questionnaire requesting comment on the appropriate role of the rules committees.

E. Proposed Amendments to Rules under Consideration by the Respective Advisory Committees

In addition to reviewing comments submitted on proposed amendments to rules published for public comment on October 15, 1993, which were reported to the Conference in September 1993, the five advisory rules committees are in various stages of consideration of other proposed rules amendments.

Appellate Rules:

The Advisory Committee on Appellate Rules approved in substance changes to Appellate Rules 27, 29, and 35, but specific language was not yet presented. The provisions of Rule 27 dealing with motion practice are in the process of being extensively rewritten and updated. Changes to the requirements in Rule 29 for

filing an amicus brief, and the procedures in Rule 35 on granting requests for in banc proceedings are also being finalized.

Bankruptcy Rules:

The Advisory Committee on Bankruptcy Rules considered and approved proposed draft amendments to Rules 2015, 3016, 4004, and 8002(c), but will not seek to publish them for public comment until a later time. The changes to Rule 2015 would clarify the duty of a debtor in a chapter 12 or 13 case to provide a complete inventory of property. Subdivision (a) of Rule 3016, which deals with the right to file a competing chapter 11 plan after the approval of a disclosure statement, would be abrogated. The amendment to Rule 4004 would delay a debtor's discharge until full payment of the filing fee, while the change to Rule 8002(c) would clarify the time when a request for an extension to file an appeal can be made. In addition to the review of specific proposed rule amendments, the Advisory Committee is actively considering the present and future impact of automation on the rules and acquiring and analyzing information in this area for the benefit of the other advisory committees.

Civil Rules:

In accordance with the recommendation of the Ad Hoc Committee on Asbestos, the Advisory Committee on Civil Rules continues its deliberative study of potential amendments to Rule 23 to determine the feasibility of facilitating mass tort litigation and otherwise improving class action procedures. The Advisory Committee is also considering changes to Rule 53 to conform the existing rule to the

actual practices of the courts and changes to Rule 68, which are discussed above. The Advisory Committee is generally studying protective orders and their use in the courts. Finally, the Advisory Committee is continuing its refinement of the "stylized" civil rules, which materially clarify and make more understandable the present rules. It is also considering the best method of circulating the draft for critical comment.

Criminal Rules:

The Advisory Committee on Criminal Rules recommended publication of proposed amendments to Rule 16, which would provide limited disclosure by the prosecution of the names, addresses, and statements of witnesses at least seven days before trial. The amendment also would provide reciprocal discovery by the defense. The recommendation represented the culmination of many years of consideration by the Advisory Committee. The Department of Justice traditionally has opposed any liberalization in the disclosure of this information prior to trial. The new Justice policymakers are reviewing the proposal afresh to determine whether an accommodation with the proponents of the rule amendment can be made.

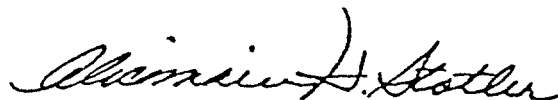
With the concurrence of the chair of the Advisory Committee, your Committee deferred consideration of whether to publish the proposed amendments to Rule 16 until its summer meeting to allow the Department of Justice an additional opportunity to seek an accommodation with the proponents of the rule change. In addition, your Committee was concerned with possible Jencks Act inconsistencies and possible technical problems with the draft.

The six-month delay in the publication of the amendments will allow time to consider further refinements to the draft and to study the Jencks Act issue, but it will not effectively delay the implementation of any amendments.

Evidence Rules:

After completing its work on Rule 412, which required immediate attention because of Congressional interest, the Advisory Committee on Evidence Rules began its overall examination of the Evidence Rules. The study is intended to identify rules that have posed problems and require further study. No specific language for rule changes was approved.

Respectfully submitted,



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