

**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. 4-5
- ▶ Federal Rules of Civil Procedure. p. 5
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NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL 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 6-7, 2000. All members attended, with the exception of Patrick F. McCartan. The Department of Justice was represented by Daniel Marcus, Acting Associate Attorney General. Roger A. Pauley, Department of Justice, Director, Office of Legislation, Criminal Division, also attended the meeting.

Representing the advisory rules committees were: Judge Will L. Garwood, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Milton I. Shadur, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Judge Alicemarie H. Stotler, former chair of the Committee; Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the

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Committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro, Deputy Chief of the Administrative Office's Rules Committee Support Office; Marie Leary of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Joseph F. Spaniol, consultant to the Committee. Judge Carol Bagley Amon, chair of the Committee on Codes of Conduct, participated in the discussion on financial disclosure by telephone.

FEDERAL RULES OF APPELLATE PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Appellate Rules proposed amendments to Rules 1, 4, 5, 15, 24, 26, 27, 28, 31, 32, 41, and 44 and new Form 6 and recommended that they be published for public comment.

Rule 1(b) (Rules Do Not Affect Jurisdiction) states that the rules cannot "extend or limit the jurisdiction of the courts of appeals." The proposed amendment would delete the provision, because it is inconsistent with recent statutes that explicitly authorize jurisdictional changes by rule amendments, e.g., authorizing interlocutory appeals.

A new Rule 4(a)(1)(C) (Time for Filing a Notice of Appeal) is proposed that would clarify the time limitations governing appeals from orders that grant or deny a writ of error *coram nobis*. The advisory committee took no position on whether such writs continue to exist. The amendment would address, however, an ongoing conflict among the courts of appeals dealing with the time limitations governing *coram nobis* appeals.

An amendment proposed to Rule 4(a)(5)(A)(ii) (Motion for Extension of Time) clarifies the circumstances under which a district court may extend the time to file a notice of appeal.

Rule 4(b)(5) (Appeal in a Criminal Case) would be amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal.

The proposed amendment to Rule 5(c) (Form of Papers; Number of Copies) would correct a cross reference.

A new Rule 15(f) (Petition or Application Filed before Agency Action Becomes Final) would hold in abeyance a premature petition for review of an agency order until the agency disposes of the last petition seeking a rehearing, reopening, or reconsideration.

The proposed amendment to Rule 24(a) (Leave to Proceed in Forma Pauperis) would resolve apparent conflicts between the rule and the Prison Litigation Reform Act.

Rule 26(a) (Computing Time) would be amended to eliminate the discrepancy between the rules of appellate procedure and the rules of civil and criminal procedure regarding the treatment of weekends and holidays in the computation of time periods. Amendments are proposed to Rules 4(a)(4)(A)(vi) (Effect of a Motion on a Notice of Appeal), Rule 27(a) (Motions), and Rule 41(b) (Mandate) to adjust deadlines in light of the new time computation method.

The proposed amendments to Rules 27(d)(1) (Motions) and 32(a) & (c) (Form of Briefs, Appendices, and Other Papers) would clarify the formatting of various papers filed in a court of appeals. Rule 28(j) (Citation of Supplemental Authorities) would be amended to set a 250-word limit on a letter submitting citation of supplemental authorities and to permit argument in such a letter.

Rule 31(b) (Serving and Filing Briefs) would correct an inadvertent omission concerning the service of briefs on unrepresented parties.

The proposed amendment of Rule 32(a)(7) (Certificate of Compliance) refers to a new Form 6, which would assist lawyers in certifying compliance with Rule 32 type-volume limitations governing briefs. Rule 32(d) would also be amended to provide a general signature requirement for all papers filed with a court.

New Rule 44(b) (Constitutional Challenge to State Statutes) would require a court to notify the attorney general of a state when a constitutional challenge to a statute of that state is raised in a case in which the state is not a party. Rule 44 already contains a similar provision requiring the Attorney General to be notified of a constitutional challenge to a federal statute.

The Committee voted to circulate in the fall the proposed amendments discussed above to the bench and bar for comment.

The Committee also discussed the advisory committee's recommendation regarding Rule 4(a)(7), which would be amended to address conflicting decisions of the courts of appeals regarding when civil judgments are entered so as to start the appellate timetable. The proposed amendment would set a 150-day "cap," under which a judgment would, for appellate purposes, be treated as entered on a separate document 150 days after its entry in the civil docket. The Civil Rules Advisory Committee was asked to work with the Appellate Rules Advisory Committee to craft a comprehensive solution to the problem, which might involve parallel amendments to the civil rules.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

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

The advisory committee is reviewing comments submitted on a preliminary draft of proposed amendments to eight bankruptcy rules published in August 1999 for public comment.

A public hearing on the proposed rule amendments was canceled because only one request to testify was received by the advisory committee. The attorney who had requested to testify agreed to submit his comments in writing.

The advisory committee is carefully monitoring pending legislation that would substantially reform the Bankruptcy Code. A few provisions in the pending bills would directly affect the bankruptcy rules, and the committee had taken steps to notify the Congress of its concerns. If the legislation were to pass, the rules would need substantial revision to reflect the statutory changes.

FEDERAL RULES OF CIVIL PROCEDURE

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

The advisory committee is reviewing comments submitted on a preliminary draft of proposed amendments to four rules and the abrogation of the Copyright Rules published in August 1999 for public comment. The proposed rule amendments would permit service under Rule 5 by electronic means with the consent of the parties. A similar proposal was included among the proposed amendments to the bankruptcy rules. A public hearing on the proposed rule amendments was canceled because only one request to testify was received by the advisory committee. The attorney who had requested to testify agreed to submit his comments in writing.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Publication and Comment :

The Advisory Committee on Criminal Rules proposed a comprehensive stylistic revision of Rules 1 through 31 and recommended that they be published for public comment. The advisory committee plans to present restyled Rules 32 through 60 to the Committee at its June

meeting with a request that the entire set of restyled rules be published in the fall for public comment.

The comprehensive revision of the criminal rules is similar in nature to the revision of the Federal Rules of Appellate Procedure, which took effect in December 1998. Like that earlier project, the advisory committee has identified ambiguities in the rules that require substantive revisions. In addition, the advisory committee has been working on separate substantive amendments to several rules, which include (1) permitting a defendant to waive presence at an arraignment, (2) requiring a defendant in a capital case to notify the government if expert testimony on mental condition will be used at sentencing, (3) authorizing video transmission of a witness's testimony from a remote location, and (4) equalizing the number of peremptory challenges provided to the defendant and the government.

The Committee voted to circulate Rules 1 through 31 to the bench and bar for comment. The advisory committee will consider changes to several rules suggested by members of the Committee and in particular will reconsider the proposed amendments equalizing the number of peremptory challenges.

FEDERAL RULES OF EVIDENCE

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

The advisory committee appointed a subcommittee to review the status of evidentiary privileges in light of the substantial congressional activity in this area. The subcommittee has begun its review and expects that the project will not be completed for several years. The advisory committee is also working on a paper identifying existing rules whose operation and ostensible meanings have been altered by caselaw.

RULES GOVERNING ATTORNEY CONDUCT

A subcommittee consisting of representatives of the advisory committees and the Committee on Court Administration and Case Management and Committee on Federal/State Jurisdiction continues to meet to discuss problems concerning the regulation of attorney conduct in federal court. Significant problems have been identified with the many and inconsistent local rules governing attorney conduct. In addition, the subcommittee is monitoring pending legislation on the subject that would require the rules committees to propose relevant attorney conduct rules within a short period of time. The subcommittee is now focusing on the scope of the practical problems caused by the local rules variations. A conference of experts and practitioners in the attorney disciplinary field will meet in February 2000.

FINANCIAL REPORTING

At the request of the Committee on Codes of Conduct, the advisory committees considered changes to their respective rules requiring non-governmental corporate parties to disclose financial interests presently required to be disclosed in appellate cases under Appellate Rule 26.1. In particular, the advisory committees have focused on the extent of information that should be disclosed, and whether courts should have the option of requiring additional information beyond that required under a future rule, so that a trial judge could ascertain whether recusal was necessary under the law.

At the request of the Committee, the Federal Judicial Center surveyed current practices and found that many courts have different local rules requiring disclosure beyond the information that is presently required under Appellate Rule 26.1. The Committee recognizes that this issue touches deeply-rooted sensitivities and represents a matter very personal to each judge. It will study the matter further and will continue to coordinate its work with the Committee on Codes of

Conduct. The Committee expects to have proposed rule amendments requiring disclosure of financial interests ready for publication at the regularly scheduled time in August 2000.

SECOND LOCAL RULES PROJECT

The Committee has embarked on a second comprehensive, national local rules project for three principal reasons. First, the Civil Justice Reform Act and plans implemented under its authority have had a large impact on local rules, which should be analyzed. Second, compliance with the uniform numbering system mandated by the Judicial Conference in 1996 should be evaluated. Finally, concerns continue to be raised over the proliferation of local rules, most prominently by various committees of the American Bar Association.

LONG-RANGE PLANNING AND BUDGETING

The Committee was presented with a brief planning document outlining the Committee's strategic issues and goals. The document will be used by the chair at the upcoming long-range planning meeting of chairs in March 2000.

Respectfully submitted,



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Chair

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