

Preliminary Draft
of
Proposed Amendments
to the
Federal Rules
of
Practice and Procedure

SUBMITTED FOR PUBLIC COMMENT

Comments Due by February 15, 2002

Administrative Office of the U. S. Courts

Leonidas Ralph Mecham, Director

**A SUMMARY FOR BENCH AND BAR
(AUGUST 2001)**

REQUEST FOR COMMENT ON PROPOSED
AMENDMENTS TO THE FEDERAL RULES
OF PRACTICE AND PROCEDURE

The Judicial Conference's Advisory Committees on Bankruptcy Rules, Civil Rules, Criminal Rules, and Evidence Rules have proposed amendments to various rules and are seeking public comment on the proposed changes.

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) **has not approved these proposals** but submits them for public comment. The proposals have not been presented to the Judicial Conference or the Supreme Court.

The full text of the proposed rules amendments and explanatory Committee Notes are set out in the *Request for Comment* pamphlets, which are posted on the Internet at <www.uscourts.gov/rules> and are available on request from the Secretary to the Rules Committee. The synopses on the following pages highlight the major aspects of the proposed Bankruptcy, Civil, Criminal, and Evidence Rule amendments. The synopses are intended to stimulate greater public comment and participation in the rulemaking process. The synopses are drawn largely from the committees' reports, which are also set out in the *Request for Comment* pamphlets.

The rules committees welcome all comments, whether favorable, adverse, or otherwise. All comments from the public on these proposals will be considered individually and carefully by the respective rules committees, which consist of experienced trial and appellate lawyers, scholars, and judges.

Written comments or comments sent electronically must be received by the Secretary to the Rules Committee **no later than February 15, 2002**. Comments may be sent electronically via the Internet at <www.uscourts.gov/rules>.

An opportunity is also provided to the public to appear at scheduled public hearings to testify regarding the proposals. Requests to appear at a public hearing must be received by the Secretary to the Rules Committee no later than 30 days prior to the scheduled date for the public hearing. Information on the Secretary's mailing address and the dates and places of the scheduled public hearings is set out at the end of this brochure.

Under the proposed schedule, the rules amendments would become effective on December 1, 2003, or later if — following the public comment period — they are in turn approved, with or without revision, by the relevant advisory committee, the Standing Committee, the Judicial Conference, and the Supreme Court, and if they are not altered by Congress.

I. Proposed Amendments to the Federal Rules of Bankruptcy Procedure:

Rule 1007 (Lists, Schedules, and Statements; Time Limits) would be amended to assist judges in making recusal decisions by requiring corporate debtors to disclose any parent corporation and any publicly-held corporation that owns 10 percent or more of its equity.

Rule 2003 (Trustees for Estates When Joint Administration Ordered) and Rule 2009 (Meeting of Creditors or Equity Security Holders) would be amended to conform the rules with recent legislation that makes multilateral clearing organizations eligible for bankruptcy relief.

Proposed amendments to Rule 2016 (Compensation for Services Rendered and Reimbursement of Expenses) require a bankruptcy-petition preparer to file a statement disclosing any fee received from a debtor in accordance with § 110(h) of the Bankruptcy Code.

New Rule 7007.1 (Corporate Ownership Statement) would require a nongovernmental corporation that is a party to an adversary proceeding to disclose any parent corporation and any publicly-held corporation that owns 10 percent or more of its equity interests to assist a judge in making a recusal decision. A party must supplement the statement if any of the circumstances change. It is derived from Appellate Rule 26.1.

Official Form 1 (Voluntary Petition) would be revised to add a box for designating a clearing-bank case filed under subchapter V of the Bankruptcy Code's Chapter 7.

Official Form 5 (Involuntary Petition) and Form 17 (Notice of Appeal) would be revised to give notice that a child-support creditor or its representative is not required, after submitting the appropriate form specified by law, to pay the fee for filing an involuntary petition or notice of appeal.

II. Proposed Amendments to the Federal Rules of Civil Procedure:

The proposed amendments to Rule 23 (Class Actions) are based on an extensive study of class actions begun in 1991 by the Advisory Committee on Civil Rules. The proposed class action amendments focus on judicial oversight of settlements, attorney appointment, attorney compensation, and timing of the certification decision and notice.

The proposed amendment of Rule 23(c)(1)(A) requires a court to make the class-certification decision "at an early practicable time" instead of "as soon as practicable." The amendment and the accompanying Committee Note explain that a court must make the certification decision promptly but only after obtaining the information necessary to make the decision on an informed basis.

Rule 23(c)(2) would be amended to require that class-action notices be in "plain, easily understood language." Under the amendment, notice must be provided in (b)(1) and (b)(2) class actions as well as in (b)(3) class actions. But the extent of the distribution is more limited than in (b)(3) actions and is provided by means calculated to reach a reasonable number of class members. Although a member cannot request exclusion from (b)(1) or (b)(2) actions, the notice informs members of the litigation so that they can, among other things, monitor it to ensure that appointed counsel are adequately representing their interests.

Rule 23(e) would be amended in several respects to strengthen the rule's provisions governing the review and approval of proposed class settlements. First, the amendment makes clear that a court must approve every pre-certification settlement, voluntary dismissal, compromise, or withdrawal of class claims. Second, the amendment adopts an explicit standard for approving a class settlement. The settlement must be "fair, reasonable, and adequate," and the court must make detailed findings to support the conclusion that the settlement meets this standard. Third, the amendment also authorizes a court to direct a party to disclose any agreement or understanding made in connection with a proposed settlement.

Proposed Rule 23(e)(3) creates a new procedure that permits a court to provide a second opt-out opportunity on settlement of a (b)(3) class action. The purpose is to support an informed decision by each class member after known settlement terms provide the opportunity and incentive to think carefully about the consequences of remaining in the class. The second opportunity is relevant only if the opt-out opportunity required in all (b)(3) actions has expired before settlement terms are known; when, as often happens, certification is directed at the same time as a settlement is proposed, the initial (b)(3) right to request exclusion protects class members without any need for a second opportunity. The committee is particularly interested in receiving comments on the choice between alternative 1, which embodies a preference for allowing a second opportunity, and alternative 2, which is neutral.

Proposed Rule 23(g) sets out appointment procedures for class counsel. The amended rule adopts an explicit standard that class counsel “must fairly and adequately represent the interests of the class.” The Committee Note makes clear that appointment as class counsel entails special, paramount responsibilities to the class as a whole. As part of the order appointing class counsel, the court may direct counsel to propose terms for awarding fees and costs, which may foster competitive applications.

Rule 23(h) would address the handling of attorney fee awards, including notification of the class of a motion for award of fees, the rights of objectors, and the criteria to be considered in determining the amount of the fee award. The amendment requires class counsel to provide notice in a reasonable manner to class members regarding any motion for an award of attorney fees. A court must make findings on the motion for attorney fee awards. The Committee Note lists factors that a court may consider in assessing the “reasonableness” of an attorney fee award. Under the amendment, a class member or a party from whom payment is sought may object to a motion for an award of attorney fees.

Amended Rule 51 (Instructions to Jury; Objections; Plain Error) restates Rule 51 in more direct terms and adds some new features. It begins by clearly authorizing the court to direct submission of requests before trial, and describing the opportunities to file requests after the initial deadline. It requires the court to inform the party of all proposed instructions, not only action on requests. A request is sufficient to assign as error a failure to give the request, without separately objecting to the failure, if the court made a definitive ruling on the record rejecting the request. A plain error affecting substantial rights also may be assigned as error despite failure to make proper requests or objections.

Rule 53 (Masters) would be comprehensively amended to reflect contemporary practice. Courts now appoint special masters for pretrial and post-judgment purposes, even though the existing rule addresses only to “trial” masters. Moreover, the existing rule provides little guidance on appointment standards or procedures. The proposed amendments would establish a framework for appointment of masters without encouraging or discouraging their use. Under the amended rule, a trial master may be appointed in an action to be tried by a jury only if directed by statute or if the parties consent. Comment is particularly requested on whether the default standard of review should be de novo review of all fact findings of a master, or whether a two-track review standard is more appropriate, i.e., a “de novo” standard governing substantive fact findings and a “clearly erroneous” standard governing non-substantive fact findings.

Rule 54 (Judgments; Costs) and Rule 71A (Condemnation of Property) would be amended to reflect amendments to Rule 53.

III. Proposed Amendments to the Federal Rules of Criminal Procedure:

Current Rule 35(c) (Correcting or Reducing a Sentence) uses the term “imposition of the sentence” as the triggering event for actions under that rule and the circuits are split on the meaning of that term. An amended version of Rule 35 that uses the term “sentencing” instead of “imposition of sentencing” will take effect on December 1, 2002, if approved by the Judicial Conference and Supreme Court, and Congress takes no action otherwise on it. The Committee has decided that the term “sentencing” may also be ambiguous. Although it considered defining sentencing as the “oral announcement” of a sentence, it concluded that the definition of sentencing should be the “entry of judgment” consistent with the triggering event for appeal under Federal Rule of Appellate Procedure 4(b).

IV. Proposed Amendments to the Federal Rules of Evidence:

The limitation on admitting extrinsic evidence contained in Rule 608(b) (Evidence of Character and Conduct of Witness) would be clarified and narrowed under the proposed amendment to apply only to cases in which the proponent's sole purpose is to impeach the witness's character for "veracity." The existing rule prohibits admitting extrinsic evidence to impeach a witness's "credibility," which has been construed broadly by some courts, resulting in conflicting case law. By limiting the application of the rule to proof of a witness's character for truthfulness, the proposed amendment clearly permits admitting extrinsic evidence offered for other grounds of impeachment.

Rule 804 (b)(3) (Statement against interest) would be amended to provide uniform treatment of hearsay statements offered as declarations against interest. The rule's requirement to present corroborating circumstances indicating the trustworthiness of any statement exposing the declarant to criminal liability that exculpates the accused would be extended to apply to a statement that incriminates the accused.

Public hearings are scheduled to be held on the amendments to

- Bankruptcy Rules in Washington, D.C., on January 4, 2002;
- Civil Rules in San Francisco, California, on November 30, 2001; Washington, D.C., on January 22, 2002; and Dallas, Texas, on February 4, 2002;
- Criminal Rules in Atlanta, Georgia, on January 7, 2002; and
- Evidence Rules in Washington, D.C., on January 23, 2002.

Those wishing to testify should contact the Secretary at the address below in writing at least 30 days before the hearing.

All written comments on the proposed rule amendments should be mailed to:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Comments on the proposed rule amendments may also be sent electronically via the Internet at <www.uscourts.gov/rules>.

In accordance with established procedures all comments submitted on the proposed amendments are available for public inspection.

The text of the proposed rule amendments and the accompanying Committee Notes can be found at the United States Federal Courts' Home Page at <www.uscourts.gov/rules> on the Internet. For further information, copies of this brochure, the *Request for Comment* pamphlets, and other materials, contact:

John K. Rabiej, Chief
Rules Committee Support Office

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