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September 30, 2005

To: Honorable John G. Roberts
Chief Justice of the United States

From: Judge David F. Levi

Re: Summary of Proposed Amendments to the Federal Rules

The amendments to the Federal Rules of Practice and Procedure transmitted from the Judicial Conference are intended to have the following consequences.

ELECTRONIC FILING

Proposed uniform amendments to Appellate Rule 25, Bankruptcy Rule 5005, and Civil Rule 5, authorize a court to require by local rule that cases be filed electronically. (Federal Rule of Criminal Procedure 49(d) incorporates by reference the filing procedures in Civil Rule 5.) Previously, the rules only authorized the courts to permit electronic filing.

APPELLATE RULES

Proposed new Rule 32.1 permits the citation in briefs of opinions, orders, or other judicial dispositions that have been designated as “not for publication,” “non-precedential,” or the like and supersedes limitations imposed on such citation by circuit rules. New Rule 32.1 takes no position on whether unpublished opinions should have any precedential value, leaving that issue for the circuits to decide. The Judicial Conference amended the proposed rule so as to apply prospectively to unpublished opinions filed on or after January 1, 2007. A court may, by local rule, continue to permit or restrict citation to unpublished opinions filed before that date.

BANKRUPTCY RULES

The proposed amendment to Rule 1009 requires a debtor to submit a corrected social security number when the debtor learns that a previously submitted social security number is

inaccurate and to provide notice of the corrected number to all others who have received the inaccurate number.

Under the proposed amendment to Rule 5005(c), the clerk of the bankruptcy appellate panel and district judges are added to the list of officers who can transmit erroneously delivered papers to the bankruptcy court clerk.

The proposed amendment to Rule 7004 makes clear that the debtor's attorney must be served with a copy of any summons and complaint filed against the debtor without regard to the manner in which the summons and complaint were served on the debtor, including personal service. Under the current rule, the debtor's attorney must be served only if the summons and complaint were served on the debtor by mail.

CIVIL RULES

Electronic-Discovery Related Amendments

The proposed amendments to Rules 16, 26, 33, 34, 37, 45, and revisions to Form 35 address discovery of electronically stored information.

The proposed amendment to Rule 16 includes electronic discovery among the topics that may be addressed in a pretrial scheduling order. Specifically, the order may include any agreements that the parties have reached to minimize the risk of waiver of privilege or work-product protection as well as any other procedures the court may adopt for the discovery of electronically stored information.

The proposed amendment to Rule 26(a) clarifies a party's duty to include in its initial disclosures electronically stored information by substituting "electronically stored information" for "data compilations." The amendment makes the rule consistent with disclosure practices in the courts and with the proposed electronic discovery amendment. It was not published for public comment and is recommended as a conforming amendment.

Under the proposed amendment to Rule 26(b)(2), in response to a discovery request a party need not produce electronically stored information that is not reasonably accessible because of undue burden or cost. If the requesting party is not satisfied with the discovery that is produced, the court must resolve the discovery dispute under the existing standards in Rule 26(b)(2).

The proposed amendment to Rule 26(b)(5) provides a procedure for asserting privilege after production that requires a party to promptly return, sequester, or destroy the specified information until the matter is resolved by the court.

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Under the proposed amendment to Rule 26(f), the parties' discovery conference is to include discussion of any issues relating to disclosure or discovery of electronically stored information.

The proposed amendment to Rule 33 clarifies that a party may answer an interrogatory requiring review of business records by providing access to the records, including electronically stored information, if the interrogating party can find the answer as readily as the responding party.

Under the proposed amendment to Rule 34, electronically stored information is explicitly recognized as a category subject to discovery that is distinct from "documents" and "things." Rule 34 is also amended to authorize a requesting party to specify the form of production, such as in paper or electronic form, and for the responding party to object. The rule provides an electronic discovery analogue to the existing language that prevents massive "dumps" of disorganized documents by requiring production of documents as they are ordinarily maintained or labeled to correspond with the categories in the request.

The proposed amendment to Rule 37(f) provides limited protection against sanctions under the rules for a party's failure to provide certain electronically stored information in discovery. The proposed amendment states that absent exceptional circumstances, sanctions may not be imposed under the civil rules if electronically stored information sought in discovery has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith.

The proposed amendment to Rule 45 conforms the provisions for subpoenas to changes in other discovery rules related to discovery of electronically stored information.

Form 35 is amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court following their Rule 26(f) discovery conference.

Other Amendments

Proposed new Rule 5.1 requires a party to notify the appropriate federal or state government official if a filed pleading, motion, or other paper draws into question the constitutionality of a federal or state statute. The notice requirement supplements the court's statutory duty to notify the appropriate government official of a constitutional challenge to a statute. The new rule replaces the provisions in Rule 24(c), which sets out the court's notice obligations. The proposed rule responds to a request for such an amendment by the Department of Justice.

Present Rule 50(b) allows a party to renew after trial a motion for judgment as a matter of law under Rule 50(a) but only if the Rule 50(a) motion was made at the close of all the evidence. The proposed amendment deletes the requirement that the Rule 50(a) motion be made at the close of all the evidence, allowing renewal of a Rule 50(a) motion that was made at any time during trial.

Proposed new Supplemental Rule G establishes comprehensive procedures governing in rem civil forfeiture actions, consolidating procedures located in several admiralty rules. Among other things, the proposed rule sets out procedures governing the filing and response to complaints involving in rem forfeitures, requires judicial authorization of arrest warrants in some cases, specifies notice requirements — including provisions for personal notice to potential claimants and the use of the internet to provide a designated government forfeiture web site as a more reliable means of publishing notice — clarifies the timing and scope of certain discovery requests, and establishes procedures to ensure early determination of a claimant's standing. Conforming amendments cross-referencing the new Rule G are also proposed to Supplemental Rules A, C, and E and Civil Rules 9, 14, 26(a)(1)(E), and 65.1.

CRIMINAL RULES

The proposed amendments to Rules 5(c), 32.1, and 41 authorize a magistrate judge to handle discrete transactions in certain proceedings by reliable electronic means, including by facsimile.

The proposed amendment to Rule 6 makes technical changes to the language added to the rule by the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. No. 108-458) in order to conform the new language with the conventions adopted during the comprehensive restyling of the Criminal Rules.

The proposed amendment to Rule 40 authorizes a magistrate judge to set conditions of release for a defendant arrested for violating any condition of release set originally in another district.

The proposed amendment to Rule 41 conforms to the USA PATRIOT ACT (Pub. L. No. 107-56) and includes a provision authorizing a judge to delay any notice required in conjunction with issuing any search warrant. It also regulates the installation of a tracking device; the contents, execution, and return of a tracking-device warrant; and the notice to the person who had been subject to the tracking device.

The proposed amendment to Rule 58 clarifies that a defendant's right to a preliminary hearing is governed by Rule 5.1, and that the right to a preliminary hearing is not limited to defendants held in custody.

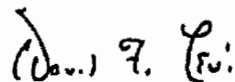
EVIDENCE RULES

The proposed amendment to Rule 404(a) resolves the conflict in the courts about the admissibility of character evidence offered as circumstantial proof of conduct in a civil case. Under the amendment, evidence of a person's character is never admissible in a civil case to prove that the person acted in conformity with the character trait.

The proposed amendment to Rule 408 resolves three longstanding conflicts in the courts about the admissibility of statements and offers made in settlement negotiations when offered to prove the validity or amount of the claim. It provides that a statement regarding a claim made in the course of settlement negotiations in a civil dispute is barred in a subsequent criminal case, unless the statement was made in an action brought by a government regulatory, investigative, or enforcement agency. It also prohibits the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. Further, the amendment bars a party from introducing its own statements and offers made during settlement negotiations when offered to prove the validity, invalidity, or amount of the claim.

The proposed amendment to Rule 606(b) generally prohibits parties from introducing jurors' testimony or affidavits in an attempt to impeach the jury verdict.

The proposed amendment to Rule 609 resolves the conflict among the courts about whether a prior conviction involves dishonesty or false statement, such that the conviction is automatically admissible to impeach the witness. The proposed amendment permits automatic impeachment only "if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness."



David F. Levi
Chair, Committee on Rules of Practice
and Procedure

cc: Honorable Samuel A. Alito, Chair, Advisory Committee on Appellate Rules
Honorable Thomas S. Zilly, Chair, Advisory Committee On Bankruptcy Rules
Honorable Lee H. Rosenthal, Chair, Advisory Committee on Civil Rules
Honorable Susan C. Bucklew, Chair, Advisory Committee on Criminal Rules
Honorable Jerry E. Smith, Chair, Advisory Committee on Evidence Rules