

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

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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 14-15, 2008. All members attended, with the exception of Chief Justice Ronald George of the California Supreme Court. Ronald J. Tenpas, Assistant Attorney General, Environment and Natural Resources Division, attended on behalf of the Department of Justice.

Representing the advisory rules committees were: Judge Carl E. Stewart, chair, and Professor Catherine T. Struve, reporter, of the Advisory Committee on Appellate Rules; Judge Laura Taylor Swain, chair, and Professor Jeffrey W. Morris, 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 Tim Reagan of the

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Federal Judicial Center; and Joseph F. Spaniol and Professor Geoffrey C. Hazard, consultants to the Committee. Chief Judge Alicemarie H. Stotler, former chair of the Committee, and Professor S. Elizabeth Gibson, the incoming reporter for the Advisory Committee on Bankruptcy Rules, also attended the meeting. Professor Stephen Burbank led a panel discussion on the implications of *Bell Atlantic v. Twombly*, with Chief Judge Anthony J. Scirica, David Bernick, Gregory Joseph, and Elizabeth Cabraser.

TIME-COMPUTATION PROJECT

In consultation with the Committee's Time-Computation Subcommittee, the Appellate, Bankruptcy, Civil, and Criminal Rules advisory committees proposed revisions to the rules governing the calculation of time periods to make the calculation method consistent and clearer across each set of rules. The revised rules would adopt a "days-are-days" approach. The committees also reviewed each set of rules to ensure that all time periods would be reasonable taking into account the effect of adopting this approach. The advisory committees concluded that virtually all short time deadlines should be extended to adjust for the effect of including intermediate weekends and holidays in calculating deadlines. To further simplify time-counting, the advisory committees proposed changing most periods of less than 30 days to multiples of 7 days. The advisory committees adopted 7, 14, 21, and 28-day periods when possible, so that deadlines will usually fall on weekdays. The advisory committees' comprehensive review of time-calculation rules and the rules containing time periods resulted in proposed amendments to a total of 91 rules.

In August 2007, proposed amendments to each set of rules were published for comment from the bench and bar. A scheduled public hearing on the amendments was canceled because no one asked to testify. At their spring 2008 meetings, the advisory committees will consider the written comments submitted on the proposed amendments.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Appellate Rules proposed an amendment to Rule 29 with a recommendation that it be published for comment. Under the proposed amendment, an amicus brief must disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. The brief must also identify every person – other than the amicus, its members, and its counsel – who contributed money intended to fund the brief's preparation or submission. The disclosure requirement is modeled on Supreme Court Rule 37.6 and serves in part to deter counsel from using an amicus brief to circumvent page limits on the party's brief.

The Committee approved the advisory committee's recommendation to publish the proposed amendment for public comment.

Informational Items

Proposed amendments to Appellate Rules 4, 22, 26, and 40 and new Rule 12.1 were circulated to the bench and bar for comment in August 2007. A scheduled hearing on the amendments was canceled because no one asked to testify. At its April 2008 meeting, the advisory committee will consider written comments submitted on the proposed amendments.

The advisory committee is considering a proposed amendment to Rule 7 to resolve the circuit split on whether "costs" for which an appeal bond can be required should include attorney's fees. The advisory committee is gathering information from court dockets, which will be used to design a study determining how often attorney's fees are included in Rule 7 appeal bonds and the types of cases in which a bond is required.

The advisory committee is studying the rules implications of the Court's decision in *Bowles v. Russell*, 127 S. Ct. 2360 (2007). In that case, the Supreme Court held that the 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional. The Court barred a late filing even though the party relied on the lower court's order, which erroneously had set a filing date beyond the 14 days.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1007, 1019, 4004, and 7001 with a request that they be published for comment.

The proposed amendment to Rule 1007 shortens the time for a debtor to file a list of creditors after the entry of an order for relief in an involuntary case. The expedited filing of the list of creditors will allow the clerk of court to notify creditors of the § 341(a) meeting within the applicable time period.

The proposed amendment to Rule 1019 provides a new time period to object to a debtor's claim of exemption in most cases when a case is converted to chapter 7 from chapter 11, 12, or 13. The proposal addresses concerns about debtors taking advantage of creditors' failure to file objections, which would have had little practical effect in the original filed bankruptcy reorganization action, but could have a much greater impact when a case has been converted to a liquidation case under chapter 7.

Under the proposed amendments to Rule 4004 and Rule 7001, an objection to a discharge on the ground that the debtor filed the pending case too soon after a prior case in which a discharge was entered must be commenced by a motion, rather than an adversary proceeding complaint. Rule 4004 is also amended to prevent the entry of a discharge if chapter 11 and 13

debtors have not filed the required statement of the completion of a personal financial management course.

The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Informational Items

Proposed amendments to Bankruptcy Rules 4008, 7052, and 9021, new Rules 1017.1 and 7058, revisions to Official Form 8, and new Official Form 27 were circulated to the bench and bar for comment in August 2007. A scheduled public hearing on the amendments was canceled because no one asked to testify. At its March 2008 meeting, the advisory committee will consider written comments submitted on the proposed amendments.

On behalf of the Judicial Conference, in November 2007 the Executive Committee approved the recommendation of the Committee to revise Official Forms 22A, 22B, and 22C, the "means test" forms. The Committee had originally recommended that the Judicial Conference approve changes to these forms at the September 2007 session. The recommendation was withdrawn when the Internal Revenue Service announced imminent changes to its National and Local Standards that affect the "means test" in the bankruptcy courts. Further revisions to 22A and 22C were necessary in light of the IRS's announcement. Form 22B was withdrawn with Forms 22A and 22C and the three forms were resubmitted together to the Judicial Conference to minimize confusion. The revisions to Forms 22A and 22C, as well as to Form 22B, all took effect on January 1, 2008.

The advisory committee is forming a group to revise and modernize bankruptcy forms. As part of this project, the group will study the forms' content, ways to make the forms easier to use and more effective to meet the needs of the judiciary and all those involved in resolving bankruptcy matters, and how to take advantage of technology advances.

FEDERAL RULES OF CIVIL PROCEDURE

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

Informational Items

Proposed amendments to Civil Rules 8, 13, 15, 48, 81, and new Rule 62.1 were published for comment in August 2007. A scheduled public hearing on the amendments was canceled because no one asked to testify. At its April 2008 meeting, the advisory committee will consider written comments submitted on the proposed amendments.

The advisory committee is considering proposed amendments to Rule 56 to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts. The practice and procedures that have developed in the district courts to implement Rule 56 are much different than the rule text, which has not been significantly changed for decades. Many districts have adopted local rules governing summary-judgment motion practice, indicating the inadequacy of the national rule. There is little uniformity among the practices in the courts, though some common themes are apparent. The advisory committee is considering amendments that draw from many of the local rules. In particular, the proposed amendments would require a statement of facts that are asserted to be undisputed and entitle the movant to summary judgment and a response that, for the purpose of the motion, addresses each fact by accepting, disputing, or accepting in part and disputing in part.

The Federal Judicial Center has completed an empirical study on summary-judgment practices, which has provided useful insights into the rule's operation. The advisory committee has conducted two mini-conferences with experienced judges and lawyers that provided additional information on the wide variances in the courts' summary-judgment rules and practices. The advisory committee will consider all this material at its April 2008 meeting.

The current draft proposed amendment to Rule 56 was presented to the Committee for preliminary review at its January 2008 meeting. The advisory committee will take the Committee's extensive discussion into account in continuing to refine the proposals.

The advisory committee is also examining Rule 26 provisions on experts retained to testify. The ABA has recommended that federal and state discovery rules be amended to prohibit the discovery of draft expert reports and to limit discovery of attorney-expert communications, without impeding discovery into the expert's opinions and the facts or data used to derive or support them. These recommendations are based on concerns that the discoverability of attorney-expert communications and draft expert reports have resulted in artificial and expensive litigation procedures that do not meaningfully contribute to determining the strengths or weaknesses of the expert's opinions. For example, experts and counsel often go to great lengths to avoid creating draft expert reports, written communications between expert witness and counsel, or notes by the expert. Parties with sufficient resources often retain two sets of experts, one for consultation purposes and a second for testimony. Depositions are prolonged by often useless inquiry into every editorial change in the draft reports. The advisory committee held two mini-conferences with experienced lawyers and judges to shed more light on the problems with the existing rule and practices. The advisory committee will consider their views at its April 2008 meeting.

The advisory committee sought preliminary reaction from the Committee to these issues. The advisory committee also sought reaction to a draft proposed amendment that would provide for attorney disclosure of the elements of opinions to be expressed by expert witnesses who are not required to provide reports under Civil Rule 26(a)(2)(B). The Committee's discussion will prove useful as the proposals are developed further.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 5, 12.3, and 21 with a request that they be published for public comment. The amendments implement the Crime Victims' Rights Act (CVRA) (18 U.S.C. § 3771).

The proposed amendment to Rule 5 specifically includes the right of a victim to be reasonably protected from the defendant as a factor that a judge must consider in determining whether to release or detain the defendant.

Rule 12.3 would be amended to prevent the disclosure of a victim's address and telephone number to the defense when a public authority defense is raised, unless the defendant establishes a need for the information. The proposed amendment provides a judge with the discretion to fashion alternative procedures that provide the defendant with necessary information, while protecting the victim in appropriate cases. The proposed amendment parallels the recently approved amendment to Rule 12.1 concerning alibi defenses.

The proposed amendment to Rule 21(b) requires the court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interest of justice – in determining whether to transfer a proceeding to another district for trial.

Request for Permanent Victims' Group Advocate on Advisory Committee

The Committee referred to the advisory committee the request of Professor Doug Beloof, which was addressed to Chief Justice John Roberts, to appoint a crime victims' advocate as a permanent member of that committee. After careful study, the advisory committee concluded that it would be inadvisable to add an advocate of a particular interest group as a permanent member. The committee noted that appointing a member specifically to serve as an advocate for a certain set of interests is inconsistent with the way in which committee members are expected

to serve and how the committee itself is expected to discharge its duties. The committee and its members are expected to be neutral in approach and to focus on improving the administration of justice overall. At the same time, the advisory committee recognizes that it is important to hear the concerns of victims' advocacy and rights groups. The advisory committee chair sent a letter to victims' rights organizations that had commented on earlier proposed rule amendments, inviting additional comments and suggestions on rule changes and asking for information on issues or concerns they may have with the implementation of CVRA in the federal courts. The Assistant Attorney General for the Criminal Division plans to regularly meet with members of the victim community before each advisory committee meeting to ensure that the Department of Justice understands current concerns. The advisory committee will take additional steps to ensure that it is informed on the current concerns of crime victims and groups advocating on their behalf.

The advisory committee and the Federal Judicial Center have also undertaken several initiatives to ensure that judges are fully informed about their obligations under the CVRA. Training and educational sessions for judges focus on the CVRA. The judges' Bench Book has been revised to highlight the judges' responsibilities under CVRA. The FJC is also developing a reference work for judges that can readily be used during trials and proceedings and a DVD explaining the court's obligations under the CVRA.

Informational Items

Proposed amendments to Criminal Rules 7, 32, 32.2, 41, Rule 11 and new Rule 12 of the Rules Governing § 2254 Cases, and Rule 11 of the Rules Governing § 2255 Proceedings were published for comment in August 2007. A scheduled public hearing on the amendments was canceled because no one asked to testify. At its April 2008 meeting, the advisory committee will consider written comments submitted on the proposed amendments.

The advisory committee has received requests that it consider amendments to Rule 6 that would allow the court, for good cause, to receive the return of an indictment by video conference; to Rule 12 requiring the defendant to assert before trial any claim that the indictment fails to state an offense; and to Rule 15 permitting the deposition of a witness outside the defendant's physical presence when it would be impractical or impossible to depose the witness in the defendant's presence (e.g., when the witness resides in a foreign country beyond the reach of process). The advisory committee is also considering an amendment that would codify procedures governing indicative rulings, similar to the procedures contained in proposed new Civil Rule 62.1.

FEDERAL RULES OF EVIDENCE

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

Informational Items

The advisory committee has begun work on "restyling" the Federal Rules of Evidence to make them clearer and easier to read. The project follows the successful restyling of the Federal Rules of Appellate, Criminal, and Civil Procedure. The advisory committee has developed a detailed preliminary time schedule for the work and established a step-by-step process built on the prior restyling projects. As with the prior restyling projects, this project is limited to making changes that are stylistic and do not change substantive meaning. The advisory committee has divided the Evidence Rules into three main blocks. Proposed changes to the first block of rules will be reviewed at the spring meeting.

The advisory committee continues to monitor case law developments after 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.

PANEL DISCUSSION ON *BELL ATLANTIC v. TWOMBLY*

Professor Stephen Burbank of the University of Pennsylvania Law School led a discussion on the implications of the Supreme Court decision in *Bell Atlantic v. Twombly*, with Chief Judge Anthony Scirica, David Bernick, Gregory Joseph, and Elizabeth Cabraser. The panel discussed the meaning of the Court’s holding and its implications for notice pleading under Rule 8, motions to dismiss under Rule 12(b), motions for more definite statement under Rule 12(e), motions to amend under Rule 15, the discovery rules, and the official forms. The panel recommended that the rules committees carefully monitor case law developments and defer specific proposals for rule amendments until there is more clarity as to the meaning of *Twombly*, its application in the courts, and its effects on practice.

LONG-RANGE PLANNING

The Committee was provided a report of the September 2007 meeting of the Judicial Conference’s committee chairs involved in long-range planning. The Committee is reviewing its long-range goals to determine whether any changes are appropriate.

Respectfully submitted,

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