

**EXCERPT FROM THE
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:**

[March 2005]

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FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed new Rule 5.1 and conforming amendments to Rule 24(c) with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench and bar for comment in August 2003. The scheduled public hearing on the proposed amendments was canceled because no one asked to testify. Although no adverse comment was submitted, the advisory committee raised some questions about particular aspects of the proposed new rule in its April 2004 meeting. Those questions were resolved at the October 2004 meeting. The advisory committee made some revisions to the published rule, primarily to accommodate the style project, to bring some language from the notes to the text.

As published for comment and as proposed for adoption, proposed Rule 5.1 required a party to notify the appropriate federal or state government official if a filed pleading, motion, or other paper drew into question the constitutionality of a federal or state statute. The notice requirement supplemented the court's duty under 28 U.S.C. § 2403 to notify the appropriate government official of a constitutional challenge to a statute. The new rule replaced the final three sentences of Rule 24(c), setting out the court's notification duty and urging a challenging party to call the court's attention to the court's duty.

Proposed Rule 5.1 responds to a specific problem. In a significant number of cases, the government has not received timely notification that the constitutionality of a law is challenged. As a result, the government cannot intervene in time to affect the record and play a meaningful role in the case. The new rule creates a dual-notice requirement designed to ensure that the appropriate government official is notified of constitutional challenges to a federal law or state statute to allow timely intervention. The duties of the party and the court to notify the government of a constitutional challenge are set out in a stand-alone rule, moved to be placed with the rules governing service and notice, which should draw more attention than the existing provision contained in the Rule 24 intervention rule. After renewed consideration, the advisory committee determined that the advantage in ensuring that the government has a timely opportunity to defend a statute's constitutionality clearly offsets the minimal burden imposed on a party to notify the government. The burden maybe reduced very low if courts that accept electronic filing develop the capability of automatically sending an electronic notification to the appropriate government official on filing of the party's Notice of Constitutional Question. The proposed rule is similar to a number of state statutes that require both the party and the court to notify the attorney general when the constitutionality of a statute is drawn into question.

The advisory committee revised the proposed rule published for comment to clarify that: (1) proceedings would not be delayed pending transmission of the certification; (2) a party could transmit the certification electronically to an address designated by the attorney general; (3) the time to intervene is 60 days from the earlier of the party's filing notice or the court's certification, but the court can extend the period to intervene; and (4) a court could reject a constitutional challenge at any time, but could not enter a final judgment holding a statute unconstitutional

before the time set to intervene expired. The Department of Justice supports the proposed new rule.

The Committee concurred with the advisory committee's recommendations, with two members voting to recommit the proposed amendments to the advisory committee for further revision. It was understood that the proposed amendments, if approved, would be transmitted along with other proposed rules amendments to the Supreme Court after the Judicial Conference met in September.

Recommendation: That the Judicial Conference approve proposed new Rule 5.1 and conforming amendments to Rule 24(c) and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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