Agenda E-19 (Summary)
Rules
March 2009

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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Rules
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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 12-13, 2009. All members attended, with the exception of Professor Daniel J. Meltzer. 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 S. Elizabeth Gibson, 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 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; Emery G. Lee of the Federal Judicial Center; and Professor Geoffrey C. Hazard, consultant to the Committee.

FEDERAL RULES OF APPELLATE PROCEDURE

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

Informational Items

Proposed amendments to Rules 1 and 29 and Form 4 were published for comment in August 2008. Scheduled public hearings on the amendments were canceled because no one asked to testify. The advisory committee will consider written comments submitted on the proposed amendments at its April 2009 meeting.

The advisory committee is considering a proposed amendment to Rule 40, which would clarify the applicability of the 45-day period for filing a petition for rehearing in a case that involves a federal officer or employee. The advisory committee initially proposed but decided not to pursue a similar change to Rule 4, because the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), raised questions about amending a rule to change a time period set by statute (28 U.S.C. § 2107).

The advisory committee is studying problems that arise when an appeal taken before entry of a judgment that requires a separate document under Civil Rule 58 is followed by a post-judgment motion that is timely only because the court failed to enter the judgment in a separate document. The effectiveness of the appeal is suspended until the post-judgment motion is disposed of. The advisory committee concluded that rather than pursuing a rule change, the better way to address these problems is to improve awareness by clerks of court and district judges' chambers of the separate-document requirement. The advisory committee will also explore whether CM/ECF could include a prompt to judges and clerks to have the judgment set out in a separate document.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rule 6003 with a request that they be published for comment. The proposed amendments make clear that a judge may enter certain orders that are effective retroactively notwithstanding the rule's requirement that the relief specified in the rule cannot be entered within 21 days after a petition has been filed. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Informational Items

Proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4004, 5009, 7001, and 9001, and new Rules 1004.2 and 5012 were published for comment in August 2008. Scheduled public hearings on the amendments were canceled because no one asked to testify. The advisory committee will consider written comments submitted on the proposed amendments at its March 2009 meeting.

On behalf of the Judicial Conference, the Executive Committee in November 2008 approved the recommendation of the Committee to revise Official Form 22A and distribute to the courts Interim Rule 1007-I with a recommendation that it be adopted through a local rule or standing order. The changes implement the National Guard and Reservists Debt Relief Act of 2008, which amends the Bankruptcy Code to exempt from means testing for a three-year period certain members of the National Guard and Reservists (Pub. L. No. 110-438). The Act was enacted on October 20, 2008. Interim Rule 1007-I and the revision to Form 22A took effect on December 19, 2008.

The advisory committee is considering amendments to Official Forms 22A and 22C to clarify certain deductions under the means test for chapter 7 and chapter 11 cases. The

amendments substitute "number of persons" and "family size" for "household" and "household size" to reflect more accurately the manner in which the deductions are to be applied and to be consistent with related IRS standards.

The advisory committee has embarked on a project to revise and modernize bankruptcy forms. As part of this project, the advisory committee is studying 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 possible approaches to take advantage of technology advances. The advisory committee is also reviewing Part VIII of the Bankruptcy Rules, which addresses appeals to district courts and bankruptcy appellate panels, to consider whether the rules should be revised to align them more closely with the Federal Rules of Appellate Procedure. A miniconference of judges, lawyers, and academics is scheduled for March 2009 in conjunction with the advisory committee's spring meeting to explore the benefits of, and concerns raised by, such a revision.

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 26 and 56 were published for comment in August 2008. Two public hearings on the amendments have been held and another public hearing is scheduled in February. The hearings were well attended, and the discussions were robust. The advisory committee will consider the testimony and written comments submitted on the proposed amendments at its April 2009 meeting.

The advisory committee is examining the Rule 26 provisions on experts retained to testify. The American Bar Association 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 hindering discovery into the expert's opinions and the facts or data used to derive or support them. These recommendations are based on experience since Rule 26 was amended in 1993. That experience has shown that discovery of attorney-expert communications and draft expert reports impedes efficient use of experts and results in artificial discovery-avoidance practices and expensive litigation procedures that do not meaningfully contribute to determining the strengths or weaknesses of the expert's opinions. Instead, such practices and procedures significantly and unnecessarily increase the costs and delays in civil discovery.

The proposed amendments to Rule 56 are not intended to change the summary-judgment standard or burdens. Instead, they are intended to improve the procedures for presenting and deciding summary-judgment motions, to make the procedures more consistent across the districts, and to close the gap that has developed between the rule text and actual practice. The rule text has not been significantly changed for over 40 years. The district courts have developed local rules with practices and procedures that are inconsistent with the national rule text and with each other. The local rule variations, though, do not appear to correspond to different conditions in the districts. The fact that there are so many local rules governing summary-judgment motion practice demonstrates the inadequacy of the national rule.

Although there is wide variation in the local rules and individual-judge rules, there are similarities in many of the approaches. The advisory committee is considering proposed amendments that draw from many of the current local rules. Under one part of the proposed amendments, unless a judge orders otherwise in the case, a movant would have to include with the motion and brief a "point-counterpoint" statement of facts that are asserted to be undisputed and entitle the movant to summary judgment. The respondent, in addition to submitting a brief, would have to address each fact by accepting it, disputing it, or accepting it in part and disputing

it in part (which could be done for purposes of the motion only). The statements are intended to require the parties to identify and focus on the essential issues and provide a more efficient and reliable process for the judge to rule on the motion. The point-counterpoint statement has been used by many courts and judges. It also has been used by courts that have subsequently abandoned it. Testimony and comments have provided support for a point-counterpoint procedure, but also have pointed to practical difficulties encountered by its use.

The proposed point-counterpoint procedure also presents a more fundamental issue. The proposed rule authorizes a judge to use a different procedure than point-counterpoint by entering an order in an individual case, but does not authorize different procedures by local rule or standing order. Some of the arguments against the point-counterpoint proposal are framed in terms of local autonomy at the cost of national uniformity. The choice to be made will depend in part on the importance of national uniformity, subject to the case-by-case departures authorized by the published proposal.

The advisory committee also is considering concerns raised by some members of the bar about a word change to Rule 56 that took effect in December 2007 as part of the Style Project. That project replaced the inherently ambiguous word "shall" throughout the rules with "must," "may," or "should," deriving the meaning for each rule from both context and court opinions interpreting and applying the rule. Before restyling, Rule 56 had used the word "shall" in stating the standard governing a court's decision to grant summary judgment. The Style Project changed the word to "should," based on case law applying the rule. ("The judgment sought *should* be rendered if [the record shows] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.") Although "should" could simply be carried forward from Rule 56 as amended in 2007, many vigorous comments express a strong preference for "must," based in part on a concern that adopting "should" in rule text will lead to

undesirable failures to grant appropriate summary judgments. These comments will be the basis for careful reexamination in light of the case law that supports "should."

The advisory committee is planning to hold a major conference in 2010 to investigate growing concerns raised by the bar about pretrial costs, burdens, and delays. The conference will examine possible rule and other changes.

FEDERAL RULES OF CRIMINAL PROCEDURE

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

Informational Items

Proposed amendments to Criminal Rules 5, 12.3, 15, 21, and 32.1 were published for comment in August 2008. Scheduled public hearings on the amendments were canceled. The two individuals requesting to testify on the proposed amendments agreed to present their testimony in conjunction with the advisory committee's April 2009 meeting. The advisory committee will consider the testimony and written comments submitted on the proposed amendments at the meeting.

The advisory committee is considering proposed amendments to: (1) Rule 12(b)(3), requiring the defendant to raise before trial "a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense"; (2) Rule 32(c), requiring disclosure to the parties of information on which the probation officer relies in preparing the presentence report; (3) Rule 32(h), requiring the court to notify the parties of *Booker* variances, as well as departures, for reasons not identified in the presentence report or the parties' submissions; and (4) Rule 41, in consultation with the Committee on Criminal Law, authorizing probation and pretrial service officers to apply for and execute searches as part of their efforts to enforce court-ordered supervision conditions. The advisory committee is also reviewing all the criminal rules

to identify any that should be updated in light of new technologies and the nearly universal use of electronic case filing. Additionally, the advisory committee is continuing to study rule changes to conform with case law implementing the Crime Victims' Rights Act and whether further rule changes may be needed in light of possible new legislation.

FEDERAL RULES OF EVIDENCE

Rules Approved for Publication and Comment

The Advisory Committee on Evidence Rules submitted proposed amendments to Rules 501-706 with a request that they be published for comment. The proposed amendments are the second part of the project to "restyle" the Evidence Rules to make them clearer and easier to read, without changing substantive meaning. The Evidence Rules "restyling" project follows the successful restyling of the Federal Rules of Appellate, Criminal, and Civil Procedure. The Committee approved the advisory committee's recommendation to publish the proposed amendments to Rules 501-706 and to delay publishing them until all the Evidence Rules have been restyled, which should occur by June 2009.

Informational Items

The advisory committee continues to monitor cases applying 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.

GUIDELINES FOR DISTINGUISHING BETWEEN LOCAL RULES AND STANDING ORDERS

The Committee considered the results of a study submitted by Professor Daniel R. Capra, reporter to the Advisory Committee on Evidence Rules, on local rules and standing orders. The report describes the inconsistent uses of local rules, standing orders, administrative orders, and

general orders, as well as problems in providing lawyers and litigants with adequate notice of standing, administrative, and general orders and making them accessible. The report proposes voluntary guidelines to assist courts in determining whether a particular subject matter should be addressed in a local rule or whether it is appropriate for treatment in a standing order. A revised report taking into account suggestions made by several Committee members will be presented for the Committee's consideration at its next meeting.

PANEL DISCUSSION ON PROBLEMS IN CIVIL LITIGATION AND POSSIBLE REFORM

Gregory Joseph, Esq., led a discussion on studies and reports from a joint project of the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System on the growing costs and burdens of civil litigation. The panel, which included Paul B. Saunders, Esq. (chair of the American College of Trial Lawyers Task Force on Discovery), Judge Rebecca Love Kourlis, Executive Director of the Institute, Joseph Garrison, Esq., and J. Douglas Richards, Esq., focused on the rising costs of electronic discovery, the public's deepening disenchantment with federal trial practices and procedures, and the flight of litigants from federal court to state court and alternative dispute organizations. The results substantiated the Civil Rules Committee's plan to hold a major conference in 2010 with judges, lawyers, and law professors addressing these issues.

JUDICIAL CONFERENCE-APPROVED LEGISLATION

At its September 2008 meeting, the Judicial Conference approved the Committee's recommendation to seek legislation adjusting the time periods in 29 statutory provisions that affect court proceedings to account for the proposed changes in the new time-computation provisions in the federal rules that will take effect on December 1, 2009, assuming that the last stages of the Rules Enabling Act process are successfully completed. The Committee is actively

pursuing the legislation and believes that it can be enacted so that its effective date is coordinated with the time-computation rules amendments.

LONG-RANGE PLANNING

The Committee was provided a report of the September 2008 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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