Agenda E-19 (Summary)
Rules
March 2013

SUMMARY OF THE

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

Approve the proposed amendment to Civil Rule 77(c)(1), and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law. . . . . pp. 7-8

The remainder of the report is submitted for the record and includes the following items for the information of the Conference:

Agenda E-19
Rules
March 2013

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 (the Committee) met on January 3-4, 2013. All members attended, except Deputy Attorney General James M. Cole, Judge Neil M. Gorsuch, and Judge Jack Zouhary.

Representing the advisory rules committees were Judge Steven M. Colloton, Chair, and Professor Catherine T. Struve (by telephone), Reporter, of the Advisory Committee on Appellate Rules; Judge Eugene R. Wedoff, Chair, Professor S. Elizabeth Gibson, Reporter, and Professor Troy A. McKenzie, Associate Reporter, of the Advisory Committee on Bankruptcy Rules; Judge David G. Campbell, Chair, Professor Edward H. Cooper, Reporter, and Professor Richard L. Marcus, Associate Reporter, of the Advisory Committee on Civil Rules; Judge Reena Raggi, Chair, and Professor Sara Sun Beale, Reporter, of the Advisory Committee on Criminal Rules; Judge Sidney A. Fitzwater, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Also participating in the meeting were Professor Daniel R. Coquillette, the Committee's Reporter; Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble (by telephone), consultants to the Committee; Jonathan C. Rose, the Committee's Secretary and Chief of the Administrative Office's Rules Committee Support Office; Benjamin J. Robinson, Counsel and

Deputy Chief of the Rules Committee Support Office; Julie Wilson, Attorney in the Rules Committee Support Office; Peter G. McCabe, the Administrative Office's Assistant Director for Judges Programs; Andrea L. Kuperman (by telephone), Chief Counsel to the Rules Committees; and Judge Jeremy D. Fogel, Director, and Dr. Joe Cecil, Senior Research Associate, of the Federal Judicial Center. Stuart F. Delery, Principal Deputy Assistant Attorney General for the Civil Division, Elizabeth J. Shapiro, and Allison Stanton attended on behalf of the Department of Justice.

In addition, the Committee held a discussion on civil litigation reform initiatives with the following panelists: Judge John G. Koeltl, U.S. District Court for the Southern District of New York and a member of the Advisory Committee on Civil Rules; Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System at the University of Denver; Dr. Emery G. Lee, Senior Research Associate, Federal Judicial Center; and Judge Barbara B. Crabb, U.S. District Court for the Western District of Wisconsin.

FEDERAL RULES OF APPELLATE PROCEDURE

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

Informational Items

At its Fall 2012 meeting, the advisory committee removed several items from its agenda. First, the advisory committee decided not to proceed with a proposed rule amendment concerning the sealing or redaction of appellate briefs. The circuits take varying approaches to sealing and redaction on appeal. In the D.C. and Federal Circuits, litigants are directed to review the record and determine whether any sealed portions should be unsealed at the time of the appeal. In some other circuits, matters sealed below are presumptively maintained under seal in the record on

appeal. In the Seventh Circuit, by contrast, the opposite presumption applies: Unless sealing is directed by statute or rule, sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or unless a party moves to seal those items on appeal.

The Seventh Circuit's approach arises from a strong presumption that judicial proceedings should be open and transparent. During the advisory committee's discussions, a number of participants expressed support for this approach. But participants also noted that each circuit currently seems happy with its own approach to sealed filings. While the advisory committee ultimately decided not to propose a rule amendment on the topic of sealing on appeal, its members felt that each circuit might find it helpful to know how other circuits handle such questions; therefore, shortly after the meeting, the chair of the advisory committee wrote to the chief judge and clerk of each circuit to summarize the concerns that have been raised about sealed filings, the various approaches to those filings in different circuits, and the rationale behind the Seventh Circuit's approach.

Second, the advisory committee removed from its agenda a proposal that Rule 4(b) be amended to lengthen from 14 days to 30 days the time for a criminal defendant to file an appeal. The rule allows 30 days for the government to file an appeal. The advisory committee considered a similar proposal between 2002-2004 and decided that no change was warranted. At the Fall 2012 meeting, participants in the discussion observed that there are institutional reasons why the government requires more time, and noted that the period between conviction and sentencing provides time for defense counsel to assess possible grounds for appealing the conviction. They also noted that the district court has discretion under Rule 4(b)(4) to extend the appeal time for good cause – a standard that could be met, for example, if defense counsel needs

additional time to assess possible grounds for appealing the sentence. In light of these considerations, members did not perceive a need to amend the rule.

Third, the advisory committee removed from its agenda a proposal that Rule 28(e) be amended to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief, rather than only in the statement of facts. Members noted that Rule 28 already requires specific citations in the argument section of a brief: Rule 28(a)(9)(A) requires that the argument contain "citations to the . . . parts of the record on which the appellant relies."

Also at the Fall 2012 meeting, the advisory committee determined that several existing items should be retained on its agenda to await future developments. For example, the advisory committee briefly considered whether the Appellate Rules should be amended in light of the shift to electronic filing and service. In particular, some participants viewed as anachronistic Appellate Rule 26(c)'s "3-day rule," which adds 3 days to a given period if that period is measured after service and service is accomplished either by electronic means or by a non-electronic means that does not result in delivery on the date of service. But the discussion did not disclose any aspects of the Appellate Rules that urgently require revision.

The advisory committee also revisited the topic of "manufactured finality" – where a party attempts to "manufacture" a final judgment by dismissing the remaining claims in a case without prejudice or conditionally in order to appeal the disposition of one or more claims. The advisory committee noted that the Supreme Court granted certiorari in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011), *cert. granted*, 133 S. Ct. 97 (2012). In *Gabelli*, the Second Circuit's jurisdiction rested on that circuit's precedent holding that an appealable judgment results if a litigant who wishes to appeal the dismissal of its primary claim dismisses all remaining claims

and commits not to reassert those claims if the judgment is affirmed, but reserves the right to reinstate the dismissed claims if the court of appeals reverses. The advisory committee decided to await the Court's decision in *Gabelli* before considering further how to proceed. The Court heard oral arguments in this case on January 8, 2013.

Finally, the advisory committee is considering whether to overhaul the treatment of length limits in the Appellate Rules. Rules 28.1(e) and 32(a)(7) set the length limits for briefs by means of a type-volume limitation, with a shorter page limit as a safe harbor. But Rules 5, 21, 27, 35, and 40 still set length limits in pages for other types of appellate filings. Members have reported that the page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read. The advisory committee intends to consider whether the time has come to extend the type-volume approach to these other types of appellate filings.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

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

Informational Items

In August 2012, the Standing Committee published for public comment nine restyled Official Bankruptcy Forms for individual debtors. These forms are the initial product of the forms modernization project, a multi-year endeavor of the advisory committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the forms modernization project are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. To date, few comments have been received; however, the advisory committee expects to receive more comments before the

February 15, 2013 deadline, and it will review those comments before deciding whether to seek approval for publication of the 18 remaining forms for individual debtors. Also as part of the forms modernization project, the advisory committee continues to consider the use of electronic signatures with a goal of recommending an amendment to the Bankruptcy Rules that establishes a uniform procedure for electronic signatures across all the rules. Currently, under Rule 5005(b) these issues in bankruptcy courts are governed by local rules that vary significantly from one district to another.

On December 1, 2011, amendments to Rule 3001(c), new Rule 3002.1, and new Official Forms 10A, 10S1, and 10S2 took effect. These rules and forms were promulgated to ensure that debtors and trustees are fully informed of the basis for home mortgage claims and the amounts that must be paid to cure any arrearages, and of the need to make payments in the proper amount on home mortgages during chapter 13 cases. The advisory committee held a mini-conference on September 19, 2012, to explore the effectiveness of the new rules and forms and to consider whether any adjustments to the requirements might be advisable. The mini-conference revealed general acceptance; however, participants expressed a desire to eliminate ambiguities in the rules and forms and to make some adjustments to facilitate compliance and to require the provision of additional information. The advisory committee's consumer issues and forms subcommittees are considering the feedback provided and are evaluating whether any amendments to the home mortgage rules or forms should be pursued.

As previously reported, an ad hoc group of the advisory committee has been working on drafting an official form plan for chapter 13 cases. The working group presented a draft of the form plan for preliminary review at the advisory committee's Fall 2012 meeting. The group also proposed amendments to Bankruptcy Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and

9009, specifically to require use of the national form plan and to establish the authority needed to implement some of the plan's provisions.

The advisory committee discussed the proposed form and rules amendments and accepted the working group's suggestion that the drafts be shared with a cross-section of interested parties to obtain their feedback on the proposals. In order to obtain this feedback, the advisory committee held a mini-conference on the draft plan and proposed rule amendments on January 18, 2013. The working group will make revisions based on the feedback received at the mini-conference and then present the model plan package to both the consumer issues and forms subcommittees for their consideration. The subcommittees will report their recommendations to the advisory committee at its Spring 2013 meeting. If a chapter 13 form plan and related rule amendments are approved at that meeting, the advisory committee will request that they be published for comment in August 2013.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 77(c)(1), with a recommendation that it be approved and transmitted to the Judicial Conference. Because the amendment is technical, prior publication for public comment is unnecessary.

The proposed amendment corrects a cross-reference to Rule 6(a) that should have been changed when Rule 6(a) was amended in 2009. Before those amendments, Rule 6(a)(4)(A) defined "legal holiday" to include 10 days set aside by statute, and Rule 77(c)(1) incorporated this definition by cross-reference.

After enactment of the 2009 amendment, the statute-based definition of legal holidays remained unchanged, but became Rule 6(a)(6)(A). Revising the cross-reference to refer to Rule 6(a)(6)(A) will correct the problem.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendment to Civil Rule 77(c)(1), and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

The proposed amendment to the Federal Rules of Civil Procedure is set forth in Appendix A, with an excerpt from the advisory committee report.

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Rules 6(d) and 55(c), with a request that they be published for comment. The Committee approved the advisory committee's recommendation.

Rule 6(d)

The purpose of the revision to Rule 6(d), the rule allowing an additional 3 days after certain kinds of service, is to foreclose the possibility that a party who must act within a specified time after making service can extend the time to act by choosing a method of service that provides added time. Before Rule 6(d) was amended in 2005, it provided an additional 3 days to respond when service was made by various described means. Only the party served, not the party making service, could claim the extra 3 days.

When Rule 6(d) was revised in 2005 for other purposes, it was restyled according to the conventions adopted for the Style Project, allowing 3 additional days when a party must act within a specified time "after service." Unfortunately, rules allowing a party to act within a specified time after making (as opposed to receiving) service were not contemplated, and time to

act "after service" could easily be read to include time to act after making service. For example, a literal reading of present Rule 6(d) would allow a defendant to extend from 21 to 24 days the Rule 15(a)(1)(A) period to amend once as a matter of course by choosing to serve the answer by any of the means specified in Rule 6(d). The advisory committee determined that this unintended effect should be corrected to make "being served" explicit.

Rule 55(c)

The proposed amendment to Rule 55(c), the rule regarding setting aside a default or a default judgment, addresses a latent ambiguity in the interplay of Rule 55(c) with Rules 54(b) and 60(b). The ambiguity arises when a default judgment does not dispose of all claims among all parties to an action. Rule 54(b) directs that the judgment is not final unless the court directs entry of final judgment. Rule 54(b) also directs that the judgment "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Rule 55(c) provides simply that the court "may set aside a default judgment under Rule 60(b)." Rule 60(b), in turn provides a list of reasons to "relieve a party . . . from a final judgment, order, or proceeding . . . ."

Close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties. Several cases, however, show that several courts have read Rule 55(c) as directing them to consider even nonfinal default judgments within the restrictions of Rule 60(b). The proposed amendment clarifies Rule 55(c) by adding the word "final" before "default judgment."

Informational Items

The advisory committee's discovery subcommittee continues to work on issues relating to preservation and sanctions that were initially raised at the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law. At its Fall 2012 meeting, the advisory committee voted to recommend approval of revisions to Rule 37(e), regarding failure to preserve discoverable information, for publication for public comment during the Committee's January 2013 meeting. With the understanding that actual publication would not occur until August 2013, the advisory committee determined that submission of a preliminary draft to the Committee would be useful. The draft rule was presented to the full Committee at its January 2013 meeting, and much discussion occurred. The advisory committee plans to incorporate the suggestions made during the Committee's meeting, and to present a refined draft to the Committee during its June 2013 meeting, with a goal of publishing new Rule 37(e) for public comment in August 2013.

As previously reported, a subcommittee formed after the 2010 Duke Conference is continuing to implement and oversee further work on ideas resulting from that conference. The advisory committee presented to the Committee a package of various potential rules amendments developed by the subcommittee that are aimed at reducing the costs and delay in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." This package of rules amendments has been developed though countless subcommittee conference calls, a mini-conference held in October 2012, and discussions during advisory committee meetings. The discussion that occurred will guide further development of the rules package, with a goal of recommending publication for public comment at the Committee's June 2013 meeting.

Lastly, the subcommittee formed to study Rule 84 and associated forms has determined that abrogation of Rule 84 is advisable. This recommendation follows months of gathering information about the general use of the forms and whether they provide meaningful help to attorneys and pro se litigants. The advisory committee is evaluating the subcommittee's recommendation. The subcommittee continues to study the issue and will next make recommendations regarding the involvement of the advisory committee in the development of civil pleading forms going forward, if Rule 84 is abrogated through the Rules Enabling Act process. If Rule 84 is abrogated, forms will remain available through other sources, including the Administrative Office. Although forms developed by the Administrative Office do not go through the full Enabling Act process, the advisory committee may continue to work with the Administrative Office in drafting and revising the forms.

FEDERAL RULES OF CRIMINAL PROCEDURE

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

Informational Items

Proposed amendments to Rule 12, the rule addressing pleadings and pretrial motions in criminal cases, and conforming amendments to Rule 34, arresting judgment, were published for public comment in August 2011. The amendments clarify which motions must be raised before trial and the consequences if the motions are not timely filed. Numerous comments were received, including detailed objections and suggestions from various bar organizations. In its consideration of the comments, the Rule 12 subcommittee reaffirmed the need for the amendment, but concluded that several changes were warranted based on the public comments. With those changes, the subcommittee has recommended to the advisory committee that the

amended proposal be approved and transmitted to the Committee. The advisory committee's consideration of the Rule 12 subcommittee's report will take place at its Spring 2013 meeting.

The Department of Justice has submitted a proposal to amend Rule 4 to permit effective service of a summons on a foreign organization that has no agent or principal place of business within the United States. The Department argues the proposed amendments are necessary to ensure that organizations committing domestic offenses are not able to avoid liability through the simple expedients of declining to maintain an agent, place of business, and mailing address within the United States. The advisory committee expects to discuss the proposal at its Spring 2013 meeting.

FEDERAL RULES OF EVIDENCE

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

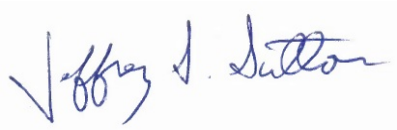
Informational Items

In conjunction with its Fall 2012 meeting, the advisory committee hosted a symposium on Rule 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver). The purpose of the symposium was to review the current use (or lack of use) of Rule 502 and to discuss ways in which the rule can be better known and understood so that it can fulfill its original purposes. Panelists included judges, lawyers, and academics with expertise and experience in the subject matter of the rule, some of whom are also veterans of the rulemaking process. The symposium proceedings and a model Rule 502(d) order will be published in the March 2013 issue of the *Fordham Law Review*.

The advisory committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), in which the Court held that

the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant. The Supreme Court's most recent *Crawford* decision came last term in *Williams v. Illinois*, 132 S. Ct. 2221 (2012), a plurality decision. After discussion at its Fall 2012 meeting, the advisory committee concluded that it will take the courts some time to determine the impact of *Williams* on the relationship between the Confrontation Clause and the Federal Rules of Evidence. Accordingly, the advisory committee determined that it would be inappropriate at this time to propose any further amendments designed to prevent one or more of the federal rules from being applied in violation of the Confrontation Clause.

Respectfully submitted,



Jeffrey S. Sutton, Chair

James. M. Cole	Wallace B. Jefferson
Dean C. Colson	David F. Levi
Roy T. Englert, Jr.	Patrick J. Schiltz
Gregory G. Garre	Larry A. Thompson
Neil M. Gorsuch	Richard C. Wesley
Marilyn L. Huff	Diane P. Wood

Appendix A – Proposed Amendment to the Federal Rules of Civil Procedure

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

To: Honorable Jeffrey S. Sutton, Chair,
Standing Committee on Rules of Practice and Procedure

From: Honorable David G. Campbell, Chair,
Advisory Committee on Federal Rules of Civil Procedure

Date: December 5, 2012

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 2, 2012. The meeting had been scheduled for November 1 and 2, but in anticipation of travel disruptions following Super Storm Sandy it was rescheduled to enable most participants to attend by video conference, webcast, or other remote means. Several participants gathered at the Administrative Office. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

* * * * *

Three other items are presented for action. One seeks approval to publish an amendment of Rule 6(d) to correct an inadvertent oversight in conforming former rule text to style conventions. The second seeks approval to publish a modest revision of Rule 55(c) to clarify a latent ambiguity that has caused some confusion. Both of these proposals seek approval for publication when they can be included in a package with more substantial rule proposals. The third seeks a recommendation to adopt without publication an inadvertent failure to correct a cross-reference in Rule 77(c)(1) when Rule 6 was revised in the Time Computation Project.

* * * * *

PART I: ACTION ITEMS

* * * * *

I.D. ACTION TO RECOMMEND PUBLICATION: CROSS-REFERENCE

ACTION ITEM: RULE 77(c)(1)

The Committee recommends adoption without publication of the following technical amendment of Rule 77(c)(1) to correct a cross-reference to Rule 6(a) that should have been amended when Rule 6(a) was amended in the Time Project amendments of 2009:

RULE 77. CONDUCTING BUSINESS; CLERK'S AUTHORITY; NOTICE OF AN ORDER OR JUDGMENT

* * * * *

(c) CLERK'S OFFICE HOURS; CLERK'S ORDERS.

(1) *Hours.* The clerk's office – with a clerk or deputy on duty – must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(~~4~~6)(A).

Before the Time Computation Project amendments, Rule 6(a)(4)(A) defined "legal holiday" to include ten days set aside by statute. Rule 77(c)(1) incorporated this definition by cross-reference. The Time Project amended Rule 6(a) in many ways. The definition of statute-designated legal holidays remained unchanged, but became Rule 6(a)(6)(A). Present Rule 6(a)(4)(A) defines the end of the "last day" for computing a time period for electronic filing. The cross-reference in Rule 77(c)(1) no longer makes sense. It is easily corrected by revising it to refer to Rule 6(a)(6)(A).

No arguable issue of policy is involved. This amendment is a clear example of a technical or conforming amendment that can be recommended for adoption without publication. See §440.20.40(d) of the Procedures for the Conduct of Business.

* * * * *

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 77. Conducting Business; Clerk's Authority; Notice of an Order or Judgment

* * * * *

(c) Clerk's Office Hours; Clerk's Orders.

(1) ***Hours.*** The clerk's office — with a clerk or deputy on duty — must be open during business hours every day except Saturdays, Sundays, and legal holidays. But a court may, by local rule or order, require that the office be open for specified hours on Saturday or a particular legal holiday other than one listed in Rule 6(a)(~~4~~6)(A).

Committee Note

The amendment corrects an inadvertent failure to revise the cross-reference to Rule 6(a) when what was Rule 6(a)(4)(A) became Rule 6(a)(6)(A).

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* New material is underlined; matter to be omitted is lined through.