Agenda F-18 (Summary)
Rules
March 1998

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:

Oppose H.R. 1536 (105th Congress), which would reduce the size of a grand jury . . . pp. 5-6

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

- Federal Rules of Appellate Procedure . . . . p. 2
- Federal Rules of Bankruptcy Procedure . . . . pp. 2-3
- Federal Rules of Civil Procedure . . . . pp. 3-5
- Federal Rules of Criminal Procedure . . . . pp. 5-8
- Federal Rules of Evidence . . . . pp. 8-10
- Rules Governing Attorney Conduct . . . . p. 10

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 8-9, 1998. All the members attended the meeting, except Patrick F. McCartan. The Department of Justice was represented by Eileen C. Mayer, Associate Deputy Attorney General.

Representing the advisory rules committees were: Judge Will L. Garwood, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge W. Eugene Davis, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Fern M. Smith, 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, and Mark D. Shapiro, deputy chief of the Administrative Office's Rules Committee Support Office; Thomas E. Willging of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee.

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FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules determined that — barring an emergency — no amendment to the rules will be forwarded until the comprehensive revision of the appellate rules have been in effect for some time. The restyled appellate rules are now before the Supreme Court for its consideration. If approved by the Court and not modified by Congress, they will take effect on December 1, 1998.

At its September 1997 meeting, the advisory committee considered the many proposals for rules amendments remaining on its agenda. It rejected or declined to take action on a good number of suggestions, and it prioritized the remaining suggestions for future consideration. In particular, the advisory committee is considering the possibility of developing uniform rules governing unpublished opinions, including their precedential effect, if any, and related matters. The Committee on Court Administration and Case Management, which is studying the long-range planning aspects of uniformity in this area, has been alerted to the advisory committee's plans.

The advisory committee presented no items for the Committee's action.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

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

The advisory committee is reviewing comments submitted on a preliminary draft of proposed amendments to 16 bankruptcy rules published in August 1997 for public comment. It is also working on proposed amendments to Rules 9013 and 9014, which deal with litigation procedures. The proposed changes would substantially revise and improve the rules governing litigation in bankruptcy cases, other than in adversary proceedings. The advisory committee is

also considering the rules-related recommendations contained in the report of the National Bankruptcy Review Commission to Congress.

FEDERAL RULES OF CIVIL PROCEDURE

Rules Approved for Publication and Comment

The Advisory Committee on Civil Rules proposed amendments to Rules B, C, and E of the Supplemental Rules for Certain Admiralty and Maritime Claims and conforming amendments to Rule 14 of the Federal Rules of Civil Procedure and recommended that they be published for public comment.

Rule B (In Personam Actions: Attachment and Garnishment) would be amended to reduce the need for service of admiralty and maritime attachment by a United States marshal. Other changes conform to 1993 amendments of Civil Rule 4. State law quasi-in-rem jurisdiction would not be borrowed for admiralty proceedings, but Rule B would expressly confirm the availability of state security remedies through Civil Rule 64.

Rule C (In Rem Actions: Special Provisions), which governs true in rem proceedings, has been invoked for civil forfeiture proceedings by a growing number of statutes. As the forfeiture practice has grown, it has become apparent that some distinctions should be made between admiralty and forfeiture proceedings. The proposed changes would allow a longer time to appear in a forfeiture proceeding than in an admiralty proceeding. They also would establish some distinctions in the procedures for asserting interests in the property brought before the court.

Rule C and Rule E (Actions in Rem and Quasi in Rem: General Provisions) would be amended to reflect statutory provisions that allow a forfeiture proceeding to be brought in a district in which the property is not located. Other changes would be made in various parts of Rule E.

Civil Rule 14 (Third-Party Practice) would be amended to reflect changes in the language of Supplemental Rule C(6).

The Committee voted to publish the proposed amendments for comment by the bench and bar at the regularly scheduled time.

Scope and Nature of Discovery

The advisory committee sponsored a major symposium on discovery reform at the Boston College School of Law in September 1997. Several panels of experienced practitioners, judges, and academics addressed distinct discovery issues, and representatives from major national bar organizations submitted papers on proposed discovery reform. In general, the consensus of the symposium's participants was that the discovery process was working well in most cases. But many complaints were expressed about the operation of the discovery rules in cases that seemed to constitute only a small percentage of all federal litigation yet generated a large share of the difficult case administration and case management problems.

At its October 1997 meeting, the advisory committee reviewed all the materials and the specific proposals presented and discussed at the symposium. It expects to begin considering specific proposed rules amendments at its spring 1998 meeting to address the concerns identified at the symposium and the discovery-related recommendations contained in the Judicial Conference's 1997 report to Congress on the Civil Justice Reform Act, including the advisability of national, uniform provisions on disclosure.

Special Copyright Rules

The Special Copyright Rules are prescribed by the Supreme Court and set out in 17 U.S.C.A. following § 501. As written, the current rules are outdated and have changed little since their enactment in 1909. Further, several provisions are of questionable constitutionality

and others are inconsistent with superseding legislation. In 1964 these problems prompted the advisory committee to recommend that the copyright rules be abrogated and that Civil Rule 65 be amended to provide an impoundment procedure for articles involved in an alleged copyright infringement. But it withdrew its recommendation because Congress was considering a thorough revision of the copyright laws. The revision was eventually enacted in 1976.

The advisory committee has again actively solicited informed comment from organizations and experienced counsel on the need to update the copyright rules, and it plans to study specific proposed amendments at its March 1998 meeting. The advisory committee intends to coordinate its actions on copyright rules with the House Judiciary Subcommittee on Courts and Intellectual Property in response to Representative Howard Coble (R-NC), chairman of the subcommittee, whose letter expressed concern that any proposed amendment might interfere with pending copyright legislation and ongoing United States multilateral treaty obligations.

Mass Torts Project

The Chief Justice has approved the establishment of an informal working group to study mass torts. The group will consist of liaisons from relevant Judicial Conference committees coordinated by the Civil Rules Advisory Committee. A report on the status of the project will be prepared in 12 months.

FEDERAL RULES OF CRIMINAL PROCEDURE

Legislation Reducing Grand Jury Size

The Committees on Criminal Law and Court Administration and Case Management referred to the Standing Rules Committee consideration of H.R. 1536 (105th Congress), a bill introduced by Representative Bob Goodlatte (R-VA) that would reduce the size of a grand jury

to not less than nine, nor more than thirteen persons and would require at least seven jurors to concur in an indictment so long as nine members were present.

The Advisory Committee on Criminal Rules reviewed the extensive work product of its 1975 predecessor committee, which found the proposal constitutional and favored similar proposed legislation. Although acknowledging the legal authority for the pending legislation and the relatively modest cost-savings associated with it, several members concluded that such a revision would be imprudent. The state chief justice who serves on the advisory committee noted the unfavorable experiences with a reduction in grand jury size in his own state. The representative from the Department of Justice noted the Department's opposition to the bill. Other members saw no problem with existing grand jury practices, and they were concerned with any proposed change of a historical and fundamental feature of American jurisprudence absent compelling reasons.

The advisory committee recognized that in most — but not all — grand jury proceedings, the prosecutor's request is approved without modification. It nonetheless voted to oppose the pending legislation for three reasons. First, a reduced grand jury would increase the possibility of a runaway prosecution. Second, a reduced grand jury would have less diversity of viewpoints and experiences. Finally, citizen participation would be diminished with a reduced size grand jury.

The Standing Committee agreed with the recommendation of the advisory committee, and it recommends that the Judicial Conference oppose H.R. 1536.

> **Recommendation:** That the Judicial Conference oppose H.R. 1536 (105th Congress), which would reduce the size of a grand jury.

Other Pending Legislation

The advisory committee considered criminal rules-related provisions in several other bills. It expressed grave concerns with the provisions of § 502 of the Omnibus Crime Control Act of 1997 (S. 3 — 105th Congress), which would reduce the size of a petit jury in a federal criminal trial to six persons with the defendant's consent. The advisory committee concluded that no change in the size of a jury was warranted. It was also concerned that in some cases defense counsel may perceive pressure from the trial judge to waive a 12-person jury.

Section 501 of the Omnibus Crime Control Act of 1997 would amend Criminal Rule 24(b) by equalizing the number of peremptory challenges between the defendant and the government. The rules committees have considered similar proposals during the past two decades. In 1976, they recommended that the defense and prosecution be given an equal number of peremptory challenges. In later rejecting the same amendments, which were approved by the Judicial Conference (JCUS-SEP 75, p. 76) and prescribed by the Supreme Court, the Senate Judiciary Committee noted that the proposal had received the greatest amount of criticism in its hearing and in submitted correspondence. In 1990, the Standing Committee rejected a proposal to equalize the number of peremptory challenges after reviewing the substantial opposition expressed during the public comment stage; and the advisory committee revisited but ultimately declined to act on a similar proposal in 1993. In part, the rules committees' views were based on deference to the perceived will of Congress on this subject.

At its October 1997 meeting, the advisory committee decided that a sufficient period of time has elapsed since Congress last addressed this issue, and a fresh review was appropriate. It

requested the reporter to draft proposed amendments to Rule 24 that would provide 10 peremptory challenges to each side in a noncapital case for consideration at its next meeting.

On another matter, the advisory committee declined to proceed on a proposal to amend Rule 5 to authorize a magistrate judge to continue a preliminary examination without the defendant's consent, thereby requiring an order of a district court judge. It was noted that no major problems with the existing practices had been reported, although the likelihood of experiencing these problems in "large" district courts was acknowledged. Under 18 U.S.C. § 3060 the defendant's consent is required. Amending Rule 5 to eliminate the requirement of consent would invite a "supersession clause" confrontation. The advisory committee concluded that the relatively modest benefits derived from the amendment were not worth risking the possibility of such a confrontation.

The advisory committee also considered pending legislation which would amend several rules of criminal procedure to provide for the right of a victim to address the court at various stages of the proceeding. The chair appointed a subcommittee to follow the progress of the proposed legislation and, if the proposed legislation appeared likely to be adopted, to report to the advisory committee and be prepared to offer alternative language to the victim allocution provisions. The matter is on the agenda for the advisory committee's April 1998 meeting.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on the Rules of Evidence proposed amendments to Rules 103, 404, 803, and 902 and recommended that they be published for public comment.

Rule 103(a) (Rulings on Evidence) would be amended to establish a uniform practice among the courts regarding the finality of rulings on motions concerning the admissibility of evidence, i.e., *in limine* rulings. The amendment provides that a claim of error with respect to a

definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a) — a renewed objection or offer of proof is not necessary at the time the evidence is to be offered. The proposed amendment also codifies the principle of *Luce v. United States*, 469 U.S. 38 (1984), concerning the preservation of a claim of error when admission of evidence is dependent on an event occurring at trial. It would apply in civil and criminal cases.

The proposed amendments to Rule 404(a) (Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes) provide that when the accused attacks the character of a victim, a corresponding character trait of the accused is admissible. The amendments are consistent with the intent of pending legislation (S. 3 — Omnibus Crime Control Act of 1997, § 503). But the proposed amendments clearly limit the admissibility of evidence to a corresponding trait. They would not permit a general attack on the defendant's credibility, for example, whenever the defendant attacks the character of the victim.

Rules 803(6) (Hearsay Exceptions; Availability of Declarant Immaterial) and 902 (Self-Authentication) would be amended to establish a procedure by which parties can authenticate certain records of regularly conducted activity (e.g., business records), other than through the testimony of foundation witnesses. The proposal is based on the procedures governing the certification of foreign records of regularly conducted activity in criminal cases as provided by 18 U.S.C. § 3505. The amendments are intended to establish a similar procedure for domestic and foreign records offered in civil cases.

The Committee voted to circulate the proposed amendments to the bench and bar for comment at the regularly scheduled time.

Rules on Experts and *Daubert*

The advisory committee continued to study whether Rule 702 should be amended to account for changes wrought by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). A subcommittee was appointed to prepare a working draft of proposed amendments to Rule 702 for the committee's consideration at its April 1998 meeting.

Other Informational Items

The advisory committee's reporter submitted a memorandum that identified statements contained in the original Advisory Committee Notes to proposed Evidence Rules amendments that are either wrong as written, or ambiguous because the original draft commented upon was later materially changed by Congress. These "historical" notes have caused confusion among readers unaware of the original mistakes or the subsequent congressional intervention. The advisory committee agreed that the memorandum should be distributed under Federal Judicial Center auspices to publishers and other interested persons. The memorandum would not be published as the work product of the Evidence Rules Committee, but rather as a work of the reporter in his individual capacity.

RULES GOVERNING ATTORNEY CONDUCT

The Standing Committee reviewed several specific proposals prepared by its reporter providing uniformity in rules governing attorney conduct. Options presented to the committee included a set of "core" national rules combined with a general default provision that relies on the applicable state law. The committee referred the proposed rules to the advisory committees for their consideration.

Respectfully submitted,

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