

**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 June 1-2, 2009. All members attended, with the exception of Chief Justice Ronald George. John Kester and Deputy Attorney General David Ogden attended part of the meeting.

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, 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, Jeffrey N. Barr, and Henry Wigglesworth, attorneys in the Office of Judges Programs in the Administrative Office; Joe

**NOTICE**

**NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL  
CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.**

Cecil, Tom Willging, and Emery G. Lee of the Federal Judicial Center; and Professors Geoffrey C. Hazard and R. Joseph Kimble, consultants to the Committee. Elizabeth Shapiro and Karyn Temple Clagget attended the meeting, representing the Department of Justice. Professor Nancy King, assistant reporter to the Advisory Committee on Criminal Rules, participated by phone.

## **FEDERAL RULES OF APPELLATE PROCEDURE**

### ***Rules Recommended for Approval and Transmission***

The Advisory Committee on Appellate Rules submitted proposed amendments to Rules 1, 4, and 29 and Form 4 with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed changes were circulated to the bench and bar for comment in August 2008. The scheduled public hearings on the proposed changes were canceled because no one asked to testify.

The proposed amendments to Rule 1 clarify that the word “state” when used in the rules includes the District of Columbia and any United States commonwealth or territory.

The proposed amendments to Rule 4(a)(7) correct cross-references to Civil Rule 58(a), which was renumbered as part of the restyling of the Civil Rules, effective December 1, 2007. The amendments were not published for public comment because they are technical and conforming.

The proposed amendments to Rule 29(a) delete the reference to a “Territory, Commonwealth, or the District of Columbia” as unnecessary in light of the new definition in Rule 1(b).

The proposed amendments to Rule 29(c) require an amicus curiae to 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, and to identify every person (other than the amicus, its members, and its counsel) who contributed

money that was intended to fund the brief's preparation or submission. The disclosure requirement, which is modeled on Supreme Court Rule 37.6, serves to deter counsel from using an amicus brief to circumvent page limits on the parties' brief. It also is intended to help judges assess whether the amicus itself considers the issue sufficiently important to justify the cost and effort of filing an amicus brief.

The proposed revision of Form 4, Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis, limits the disclosure of personal-identifier information on the form consistent with the privacy provisions of Rule 25(a)(5).

The Committee concurred with the advisory committee's recommendations.

**Recommendation:** That the Judicial Conference —

Approve the proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 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.

The proposed amendments to the Federal Rules of Appellate Procedure are in Appendix A, with an excerpt from the advisory committee report.

### ***Informational Items***

Proposed amendments to Rule 40, which clarify the applicability of the 45-day period for filing a petition for rehearing in a case that involves a federal officer or employee, were withdrawn for further consideration in light of the pendency of a case before the Supreme Court that could affect the rule. A proposed change to a provision in Rule 4, also relating to calculating a filing deadline in a case involving a federal officer or employee, had earlier been tabled because the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), raised questions about changing a time period in a rule when that period was also set by statute.

A joint subcommittee of members from the advisory committee and the Civil Rules Committee is studying issues of mutual concern. The issues include whether parties can

“manufacture finality” to appeal by voluntarily dismissing unresolved peripheral claims when the district court has ruled on the main claims in the case.

## **FEDERAL RULES OF BANKRUPTCY PROCEDURE**

### ***Rules Recommended for Approval and Transmission***

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, new Rule 5012, and proposed revisions to Exhibit D to Official Form 1 and to Official Form 23, with a recommendation that they be approved and transmitted to the Judicial Conference. Except as noted below, the proposed changes were circulated to the bench and bar for comment in August 2008. The scheduled public hearings on the proposed changes were canceled because no one asked to testify.

The proposed amendments to Rule 1007 shorten the time for a debtor in an involuntary case to file the list of creditors that must be included on schedules filed in the case. The proposed amendments also give individual debtors in a chapter 7 case additional time to file a statement of completion of the mandatory course in personal financial management.

The proposed amendments to Rule 1019 provide a new time period to object to a claim of exemptions when a case is converted to chapter 7 from chapter 11, 12, or 13. The new time period does not apply, however, if the conversion occurs more than one year after the entry of the first order confirming a plan, or if the case was previously pending under chapter 7 and the objection period had expired in the original chapter 7 case.

The proposed amendments to Rule 4001 adjust the time deadlines in the rule consistent with the amendments to Rule 9006(a) that are scheduled to take effect in December 2009, which simplify the method to compute time under the rules. The changes were not published for public comment because they are technical and conforming.

The proposed amendments to Rule 4004 clarify that the time deadline governing the filing of a *complaint* objecting to a debtor's discharge in a chapter 7 case also applies to a *motion* objecting to the discharge. In addition, the amendments set a deadline to file a motion in a chapter 13 case objecting to a debtor's discharge. In chapter 11 and 13 cases, a court must withhold entering the discharge if the individual debtor fails to file a statement attesting to the completion of a mandatory personal financial-management course.

Under the proposed amendments to Rule 7001, specified objections to a discharge in chapter 7 and 13 cases are not treated as adversary proceedings, because they typically are resolved more easily than other discharge objections and do not require the more elaborate procedures applicable to adversary proceedings.

The proposed revision of Exhibit D to Official Form 1 modifies the debtor's statement of compliance with the credit-counseling requirement. The reference in the statement to the five-day time period in which an individual debtor requested credit counseling, but failed to obtain it before filing a chapter 7 petition, is revised and the time period increased to seven days. The changes are consistent with similar changes to 11 U.S.C. § 109(h)(3)(A)(ii). The revision was not published for public comment because it is technical and conforming.

The proposed revision of Official Form 23 adjusts the deadline to file a statement of completion of a personal financial-management course, consistent with the proposed amendments to Rule 1007(c), which extend the deadline for filing the statement from 45 days to 60 days. The changes were not published for public comment because they are technical and conforming.

Amendments to five rules, Rules 1014, 1015, 1018, 5009, and 9001, and new Rule 5012, are proposed consistent with the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-8), adding chapter 15 to the Bankruptcy Code. New

chapter 15 governs ancillary and other cross-border insolvency cases. Its primary purpose is to foster cooperation and coordination between United States courts and foreign courts in which insolvency proceedings are pending against the same debtor. A case is commenced under new chapter 15 when a foreign representative files a petition for recognition of the foreign proceeding. If the court recognizes the foreign proceeding, limited relief is immediately provided, including an automatic stay, and several other sections of the Code become applicable.

The proposed amendments to Rule 1014 authorize a court to determine the district in which a case should proceed when multiple petitions – including a chapter 15 petition – involving the same debtor are pending in different districts.

The proposed amendments to Rule 1015 explicitly recognize a court’s authority to consolidate or jointly administer cases when one or more of the petitions – including a petition under chapter 15 – is filed by, against, or regarding the same debtor.

The proposed amendments to Rule 1018 apply selected Part VII rules designated to govern proceedings contesting an involuntary petition to proceedings contesting a chapter 15 petition for recognition. The amendments also clarify that Rule 1018 does not apply to matters that are “merely related” to a contested involuntary petition.

The proposed amendments to Rule 5009 require a foreign representative to file a final report describing the nature and results of that representative’s activities in the court. The foreign representative must notify interested parties of the report. Those parties have 30 days to file objections. The amendments also require the clerk to notify individual chapter 7 and chapter 13 debtors that their case may be closed without the entry of a discharge if they fail to file a timely statement that they have completed a personal financial-management course.

Proposed new Rule 5012 sets out notice provisions and establishes procedures in chapter 15 cases for obtaining court approval of an agreement or protocol coordinating insolvency proceedings pending in another country involving the debtor.

The proposed amendments to Rule 9001 apply the definitions of words and phrases listed in § 1502 of the Code, governing cross-border insolvencies, to the rules.

The Committee concurred with the advisory committee's recommendations.

**Recommendation:** That the Judicial Conference —

- a. Approve the proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012 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.
- b. Approve the proposed revision of Exhibit D to Official Form 1 and of Official Form 23 to take effect on December 1, 2009.

The proposed amendments to the Federal Rules of Bankruptcy Procedure are in Appendix B, with an excerpt from the advisory committee report.

#### ***Rules Approved for Publication and Comment***

The advisory committee submitted proposed amendments to Rules 2003, 2019, 3001, and 4004, and new Rules 1004.2 and 3002.1, and proposed revisions of Official Forms 22A, 22B, and 22C with a request that they be published for comment. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment.

Proposed new Rule 1004.2, which was previously published for comment, requires that a petition for recognition of a foreign proceeding under chapter 15 identify the countries where a foreign proceeding is pending against the same debtor and the country where the debtor has the center of its main interests. The rule sets out applicable notice provisions and generally requires that a challenge to the designation of the debtor's center of main interests be raised before the hearing on the petition for recognition.

The proposed amendments to Rule 2003 require the official presiding at a creditors' or equity security holders' meeting to file a statement after the meeting adjourns indicating when the next meeting will be held.

The proposed amendments to Rule 2019 substantially expand the types of financial information that must be disclosed about certain creditors and equity security holders in chapter 9 Municipality and chapter 11 Reorganization cases and about the entities that must disclose the information.

The proposed amendments to Rule 3001 require additional information to accompany certain proofs of claim in a case involving an individual debtor. The amendments also specify the penalties for claim-holders that fail to provide the additional information.

Proposed new Rule 3002.1 establishes notice requirements governing: (1) payment changes; (2) assessment of fees, expenses, and charges; and (3) final cure payments relating to a home mortgage claim. The rule implements § 1322(b)(5) of the Code, which permits a chapter 13 debtor to cure a default and to maintain payments of a home mortgage over the course of the debtor's plan.

The proposed amendments to Rule 4004 allow a party to seek an extension of time, under specified circumstances, to object to a discharge after the time for filing objections has expired.

The proposed revisions of Official Forms 22A, 22B, and 22C make modest changes, including deleting certain references to "household size," clarifying the requirements for reporting regular payments by another person for household purposes, and providing additional instructions about when joint filers should complete separate forms.

### ***Informational Items***

The advisory committee is revising and modernizing bankruptcy forms. As part of this project, the advisory committee is analyzing 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 has retained the services of a consultant who is expert in designing forms.

The advisory committee is also reviewing Part VIII of the Bankruptcy Rules, which address appeals to district courts and bankruptcy appellate panels. The advisory committee is considering whether the rules should be revised to align them more closely with the Federal Rules of Appellate Procedure. Though based on the original Appellate Rules, Part VIII has not been updated to account for the amendments to the Appellate Rules or for changes in practice during the past 25 years. A miniconference of judges, lawyers, and academics was held in March 2009 in conjunction with the advisory committee's spring meeting to explore the benefits of, and concerns raised by, such a revision. An additional miniconference has been scheduled for September 2009 at Harvard Law School in conjunction with the advisory committee's fall meeting.

### **FEDERAL RULES OF CIVIL PROCEDURE**

#### ***Rules Recommended for Approval and Transmission***

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 8(c), 26, and 56, and Illustrative Form 52, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments to Rules 26 and 56 were circulated to the bench and bar for comment in August 2008. Approximately 90 witnesses testified at the three public hearings on the proposed amendments to Rules 26 and 56. The

proposed amendment to Rule 8(c) was circulated earlier for comment in August 2007, and the scheduled public hearings were canceled because no one asked to testify.

The proposed amendment to Rule 8(c) deletes the reference to “discharge in bankruptcy” from the rule’s list of affirmative defenses that must be asserted in response to a pleading. Under 11 U.S.C. § 524(a), a discharge voids a judgment to the extent that it determines the debtor’s personal liability for the discharged debt. Though the self-executing statutory provision controls and vitiates the affirmative-defense pleading requirement, the continued reference to “discharge” in Rule 8’s list of affirmative defenses generates confusion, has led to incorrect decisions, and causes unnecessary litigation. The amendment conforms Rule 8 to the statute. The Committee Note was revised to address the Department of Justice’s concern that courts and litigants should be aware that some categories of debt are excepted from discharge.

The proposed amendments to Rule 26 apply work-product protection to the discovery of draft reports by testifying expert witnesses and, with three important exceptions, communications between those witnesses and retaining counsel. The proposed amendments also address witnesses who will provide expert testimony but who are not required to provide a Rule 26(a)(2)(B) report because they are not retained or specially employed to provide such testimony, or they are not employees who regularly give expert testimony. Under the amendments, the lawyer relying on such a witness must disclose the subject matter and summarize the facts and opinions that the witness is expected to offer.

The proposed amendments address the problems created by extensive changes to Rule 26 in 1993, which were interpreted to allow discovery of all communications between counsel and expert witnesses and all draft expert reports and to require reports from all witnesses offering expert testimony. More than 15 years of experience with the rule has shown significant practical problems. Both sets of amendments to Rule 26 are broadly supported by lawyers and bar

organizations, including the American Bar Association, the Council of the American Bar Association Section on Litigation, the American College of Trial Lawyers, the American Association for Justice (formerly ATLA), the Federal Magistrate Judges' Association, the Lawyers for Civil Justice, the Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, and the United States Department of Justice.

Experience with the 1993 amendments to Rule 26, requiring discovery of draft expert reports and broad disclosure of any communications between an expert and the retaining lawyer, has shown that lawyers and experts take elaborate steps to avoid creating any discoverable record and at the same time take elaborate steps to attempt to discover the other side's drafts and communications. The artificial and wasteful discovery-avoidance practices include lawyers hiring two sets of experts – one for consultation, to do the work and develop the opinions, and one to provide the testimony – to avoid creating a discoverable record of the collaborative interaction with the experts. The practices also include tortuous steps to avoid having the expert take any notes, make any record of preliminary analyses or opinions, or produce any draft report. Instead, the only record is a single, final report. These steps add to the costs and burdens of discovery, impede the efficient and proper use of experts by both sides, needlessly lengthen depositions, detract from cross-examination into the merits of the expert's opinions, make some qualified individuals unwilling to serve as experts, and can reduce the quality of the experts' work.

Notwithstanding these tactics, lawyers devote much time during depositions of the adversary's expert witnesses attempting to uncover information about the development of that expert's opinions, in an often futile effort to show that the expert's opinions were shaped by the lawyer retaining the expert's services. Testimony and statements from many experienced plaintiff and defense lawyers presented to the advisory committee before and during the public

comment period showed that such questioning during depositions was rarely successful in doing anything but prolonging the questioning. Questions that focus on the lawyer's involvement instead of on the strengths or weaknesses of the expert's opinions do little to expose substantive problems with those opinions. Instead, the principal and most successful means to discredit an expert's opinions are by cross-examining on the substance of those opinions and presenting evidence showing why the opinions are incorrect or flawed.

The advisory committee's analysis of practice under the 1993 amendments to Rule 26 showed that many experienced lawyers recognize the inefficiencies of retaining two sets of experts, imposing artificial record-keeping practices on their experts, and wasting valuable deposition time in exploring every communication between lawyer and expert and every change in the expert's draft reports. Many experienced lawyers routinely stipulate at the outset of a case that they will not seek draft reports from each other's experts in discovery and will not seek to discover such communications. In response to persistent calls from its members for a more systematic improvement of discovery, the American Bar Association issued a resolution recommending that federal and state procedural rules be amended to prohibit the discovery of draft expert reports and 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. The State of New Jersey did enact such a rule and the advisory committee obtained information from lawyers practicing on both sides of the "v" and in a variety of subject areas about their experiences with it. Those practitioners reported a remarkable degree of consensus in enthusiasm for and approval of the amended rule. The New Jersey practitioners emphasized that discovery had improved since the amended rule was promulgated, with no decline in the quality of information about expert opinions.

The proposed amendments to Rule 26 recognize that discovery into the bases of an expert's opinion is critical. The amendments make clear that while discovery into draft reports and many communications between an expert and retaining lawyer is subject to work-product protection, discovery is not limited for the areas important to learning the strengths and weaknesses of an expert's opinion. The amended rule specifically provides that communications between lawyer and expert about the following are open to discovery: (1) compensation for the expert's study or testimony; (2) facts or data provided by the lawyer that the expert considered in forming opinions; and (3) assumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion.

In considering whether to amend the rule, the advisory committee carefully examined the views of a group of academics who opposed the amendments. These academics expressed concern that the amendments could prevent a party from learning and showing that the opinions of an expert witness were unduly influenced by the lawyer retaining the expert's services. These concerns were not borne out by the practitioners' experience. After extensive study, the advisory committee was satisfied that the best means of scrutinizing the merits of an expert's opinion is by cross-examining the expert on the substantive strength and weaknesses of the opinions and by presenting evidence bearing on those issues. The advisory committee was satisfied that discovery into draft reports and all communications between the expert and retaining counsel was not an effective way to learn or expose the weaknesses of the expert's opinions; was time-consuming and expensive; and led to wasteful litigation practices to avoid creating such communications and drafts in the first place.

Establishing work-product protection for draft reports and some categories of attorney-expert communications will not impede effective discovery or examination at trial. In some cases, a party may be able to make the showings of need and hardship that overcome work-

product protection. But in all cases, the parties remain free to explore what the expert considered, adopted, rejected, or failed to consider in forming the opinions to be expressed at trial. And, as observed in the Committee Note, nothing in the Rule 26 amendments affects the court's gatekeeping responsibilities under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The proposed amendments to Rule 56 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 proposed amendments are not intended to change the summary-judgment standard or burdens.

The text of Rule 56 has not been significantly changed for over 40 years. During this time, the Supreme Court has developed the contemporary summary-judgment standards in a trio of well-known cases, and the district courts have, in turn, prescribed local rules with practices and procedures that are inconsistent in many respects with the national rule text and with each other. The local rule variations do not appear to be justified by unique or 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 among them. The proposed amendments draw from many summary-judgment provisions common in the current local rules. For example, the amendments adopt a provision found in many local rules that requires a party asserting a fact that cannot be genuinely disputed to provide a "pinpoint citation" to the record supporting its fact position. Other salient changes: (1) recognize that a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746 as a substitute for an

affidavit to support or oppose a summary-judgment motion; (2) provide courts with options when an assertion of fact has not been properly supported by the party or responded to by the opposing party, including considering the fact undisputed for purposes of the motion, granting summary judgment if supported by the motion and supporting materials, or affording the party an opportunity to amend the motion; (3) set a time period, subject to variation by local rule or court order in a case, for a party to file a summary-judgment motion; and (4) explicitly recognize that “partial summary judgments” may be entered.

The public comment drew the advisory committee’s attention to two provisions that raised significant interest. The first dealt with a single word change in the rule that took effect in December 2007 as part of the comprehensive Style Project and remained unchanged in the Rule 56 proposal published for comment in August 2008. The second was a proposed amendment that would have enhanced consistency by putting in the national rule the practice of many courts requiring parties to submit a “point-counterpoint” statement of undisputed facts. This proposed “point-counterpoint” provision in the national rule was a default, subject to variation by a court’s order in a case. With the exception of these two important aspects, the public comment on all other provisions of the proposed amendments was highly favorable.

The first aspect of divided public comment related to a change made in 2007 with virtually no comment. As part of the Style Project, the word “shall,” which appeared in many rules, was changed in each rule to clarify whether it meant “must,” “may,” or “should.” The word “shall” is inherently ambiguous. Whether “shall” meant, in a particular rule, “must,” “may,” or “should,” had to be determined by studying the context and how courts had interpreted and applied the rule. In 2007, the word “shall” in Rule 56(a) was changed to “should” in stating the standard governing a court’s decision to grant summary judgment. (“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.”) The change to “should” was based on the advisory committee’s and Standing Committee’s study of the case law. Like all the changes made as part of the Style Project, the change to “should” in Rule 56(a) was accompanied by a statement that the change was intended to be stylistic only and not intended to change the substantive meaning or make prior case law inapplicable. That change was virtually unnoticed until the current proposed amendments to Rule 56 were published for comment. Those amendments left the word “should” unchanged, consistent with the intent to improve the procedures for litigating summary-judgment motions but not to change the standard for granting or denying them.

Many comments expressed a strong preference for “must” or “shall,” based in part on a concern that retaining “should” in rule text would lead to undesirable failures to grant appropriate summary judgments. Proponents of the word “must” pointed to language in opinions stating that a grant of summary judgment is directed when the movant is “entitled” to judgment as a matter of law. These comments emphasized the importance of summary judgment as a protection against the burdens imposed by unnecessary trial and against the shift of settlement bargaining power that follows a denial of a valid summary-judgment motion.

Equally vigorous comments expressed a strong preference for retaining “should.” These comments emphasized the importance of the trial court having some discretion in handling summary-judgment motions, particularly motions for partial summary judgment that leave some issues to be tried, and the trial record will provide a superior basis for deciding the issues as to which summary judgment was sought. These comments emphasized case law supporting the continued use of the word “should” as opposed to changing the word to “must.” And trial-court judges pointed out that a trial may consume much less court time than would be needed to

determine whether a summary judgment can be granted, besides providing a more reliable basis for the decision at the trial level and a better record for appellate review.

After considering these comments, and after extensive research into the case law in different contexts, the advisory committee concluded that it could not accurately or properly decide whether “shall” in Rule 56(a) meant “must” or “should” in all cases. Both the proponents of “must” and of “should” found support for their position in the case law. The case law ambiguity on whether “shall” means “must” or “should” is further complicated by circuit differences in the summary-judgment standard and differences in the standard depending on the subject matter. But the cases reflect, in part, the fact that they were decided based on the word “shall” in the statement of the standard for granting summary-judgment motions. The advisory committee decided that changing the word “shall” created an unacceptable risk of changing the substantive summary-judgment standard as it had developed in different circuits and different subject areas. The advisory committee decided that the words of Rule 56(a) – “The court *shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law” – had achieved the status of a term of art or “sacred phrase” that could not be safely changed for stylistic reasons without risking a change to substantive meaning. Instead, the advisory committee decided to restore the word “shall” to avoid the unintended consequences of either “must” or “should” and to allow the case law to continue to develop.

After extensive public comment, the advisory committee decided to withdraw the “point-counterpoint” proposal that was included in the rule text published for comment. Under the proposal, a movant would be required 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). A court could vary the procedure by order in a case. The point-counterpoint statements were intended to identify the essential issues and provide a more efficient and reliable process for the judge to rule on the motion.

During the public comment period, the advisory committee heard from lawyers and judges who found the point-counterpoint statement useful and efficient. But the advisory committee also heard that the procedure can be burdensome and expensive, with parties submitting long and unwieldy lists of facts and counter-facts. Some courts adopted the point-counterpoint procedure by local rule and subsequently abandoned it or are rethinking it. Testimony and comments did not provide sufficient support for including the point-counterpoint procedure in the national rule. Instead, the rule is revised to continue to provide discretion to the courts to adopt the procedure or not, by entering an order in an individual case or by local rule.

The proposed revision of Illustrative Form 52, Report of the Parties' Planning Meeting, (formerly Form 35), corrects an inadvertent omission made during the comprehensive revision of illustrative forms in 2007. The revision reinstates two provisions that took effect in 2006 but were omitted in the comprehensive revision in 2007. The provisions require that a discovery plan include: (1) a reference to the way that electronically stored information would be handled in discovery or disclosure; and (2) a reference to an agreement between parties regarding claims of privilege or work-product protection. The two provisions are consistent with amendments to Rule 16(b)(3) that took effect in 2006. The proposed revision is not published for public comment because it is technical and conforming.

The Committee concurred with the advisory committee's recommendations.

**Recommendation:** That the Judicial Conference —

Approve the proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 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.

The proposed amendments to the Federal Rules of Civil Procedure are in Appendix C, with an excerpt from the advisory committee report.

### ***Rule Approved for Publication and Comment***

The advisory committee submitted proposed amendments to Supplemental Rule E(4)(f) of the Federal Rules of Civil Procedure with a request that publication for comment be deferred. The amendments delete the reference to a repealed statute and include a cross-reference to the forfeiture provisions in Supplemental Rule G. The Committee approved the advisory committee's recommendation to publish the proposed amendments for public comment at a suitable time in the future.

### ***Informational Items***

The advisory committee is planning to hold a major conference in May 2010 to investigate growing concerns about pretrial costs, burdens, and delays. The conference will examine possible rule and other changes. It will be held at the Duke University School of Law.

The advisory committee is considering amending Rule 45, dealing with subpoenas to nonparties, to address several problems that have raised concerns of misuse or possible abuse.

The advisory committee is also studying security concerns raised by personal service of pleadings and other papers under Rule 4 on government officials, including federal judges, sued in an individual capacity in connection with the performance of official duties. The advisory

committee is gathering data and considering whether the concerns are better addressed by legislation or by proposed amendments to Rule 4.

## **FEDERAL RULES OF CRIMINAL PROCEDURE**

### ***Rules Recommended for Approval and Transmission***

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 12.3, 15, 21, and 32.1, 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 2008. Scheduled public hearings on the amendments were canceled. The two individuals asking to testify on the proposed amendments agreed to present their testimony in conjunction with the advisory committee's April 2009 meeting.

The proposed amendment to Rule 12.3 provides that a victim's address and telephone number should be disclosed to the defense when a public-authority defense is raised only if the defendant establishes a need for the information. The amendment parallels a similar change made in 2008 to Rule 12.1, dealing with notice of an alibi defense, providing the court with discretion to order disclosure of the information or to fashion an alternative procedure that gives the defendant the information necessary to prepare a defense but also protects the victim's interests. The amendments are consistent with the Crime Victims' Rights Act (18 U.S.C. § 3771).

The proposed amendments to Rule 15 authorize a deposition taken outside the United States to occur without the defendant's presence in limited circumstances and only if the court makes specific findings. Under the amendments, the trial court must make case-specific findings before allowing such a deposition, including that: (1) the witness's testimony could provide substantial proof of a material fact in a felony prosecution; (2) there is a substantial likelihood the witness's attendance at trial cannot be obtained; (3) the defendant cannot be present at the

deposition or it would not be possible to securely transport the defendant to the witness's location for a deposition; and (4) the defendant can meaningfully participate in the deposition through reasonable means. The amendments do not address the admissibility of the testimony produced by such a deposition; courts will continue to resolve that issue in accordance with the Federal Rules of Evidence and the Constitution.

Current Rule 15 does not expressly authorize depositions of witnesses in another country when the defendant is in the United States. But several courts of appeals have authorized such depositions in limited circumstances. The Second Circuit in *United States v. Salin*, 855 F.2d 944, 947 (2nd Cir. 1988), found proper the deposition of a witness held in custody in France although the defendant was in United States custody and could not be securely transported. The Third Circuit in *United States v. Gifford*, 892 F.2d 263, 264 (3rd Cir. 1989), approved a government-requested deposition of two witnesses in Belgium who were unavailable for trial when the defendant was able to participate by telephone. The Fourth Circuit in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), approved a deposition of two witnesses in Saudi Arabia, without the defendant's presence. The defendant remained in the United States and was ultimately convicted of affiliation with an al-Qaeda terrorist cell located in Saudi Arabia. The Ninth Circuit in *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998), approved the deposition of witnesses in Canada, without the defendant's presence. Those witnesses were unable to testify in the United States. In each case, the court found that procedures were in place that permitted the defendant to participate in the deposition from the United States.

In these cases, the courts have approved depositions of witnesses in foreign countries without the presence of the defendant, based on the need for the deposition and the ability to implement procedures for the defendant to meaningfully participate. But the cases have not

created a consistent or predictable procedure to govern when such depositions are proper and what procedures are necessary. The Department of Justice contends that a national rule would avoid unnecessary confusion caused by different deposition standards being developed by individual courts and would give useful guidance to both courts and lawyers. The Department emphasizes that there is a vital need for such depositions in cases in which a critical prosecution witness lives in or flees to another country, outside federal-court subpoena power. Although such cases are not common, they can involve important interests. The need for a clear procedure is particularly acute in national security cases.

In response to concerns that the proposed amendments would inappropriately increase the number of such depositions, the Department points to the high cost and the elaborate and numerous steps required for a federal prosecutor to depose a witness in a foreign country, particularly a witness in custody in that country. The Department contends that these barriers effectively limit how often such depositions are sought. The Department plans to give even greater force to these practical limitations by revising its internal guidance to require the approval of the Assistant Attorney General or designee in every case in which the United States seeks to depose a witness outside the country.

The advisory committee was mindful that the Supreme Court declined in 2002 to approve and transmit to Congress proposed amendments to Rule 26, which would have permitted the presentation of testimony at trial by two-way video when the court finds there are “exceptional circumstances,” “appropriate safeguards” are used, and the witness is “unavailable” within the meaning of Evidence Rule 804(a). In a statement accompanying the transmission of the amendments to Congress, Justice Scalia concluded that the Rule 26 proposal was contrary to *Maryland v. Craig*, 497 U.S. 836 (1990), because it did not “limit the use of testimony via video transmission to instances where there has been a ‘case specific finding’ that it is ‘necessary to

further an important public policy.’” The proposed amendments to Rule 15 address this concern.

They require the court to make case-specific findings that the deposition is necessary because the witness’s presence in the United States cannot be obtained and that it “further[s] an important public policy” because it could provide substantial proof of a material fact in a felony prosecution, and that procedures will be used to allow the defendant’s meaningful participation.

In addition, the Committee Note makes clear that the taking of the deposition under the rule is a discovery procedure and in no way forecloses a challenge to admission of the testimony at trial based on the Confrontation Clause or the Federal Rules of Evidence. For example, if the technology used to ensure the defendant’s participation does not work well, the deposition would likely not be admitted. Similarly, if the situation changes so that it becomes possible for the witness to testify at trial, the deposition might not be admitted.

The advisory committee concluded that the Department of Justice made a strong case for the proposed amendments, that the deposition procedure would be used in limited circumstances in a limited number of cases, that the amendments required procedures to allow the defendant meaningfully to participate in the deposition, and that the Confrontation Clause concerns were addressed.

The proposed amendment to Rule 21(b) requires a court to consider the convenience of victims – as well as the convenience of the parties and witnesses and the interests of justice – in determining whether to transfer all or part of the proceedings to another district for trial. The amendment would apply only if a defendant moves to transfer the case for convenience; it does not apply to motions for transfer based on prejudice under Rule 21(a).

The proposed amendments to Rule 32.1 are designed to end the confusion over the applicability of 18 U.S.C. § 3143(a) – to which the current rule refers – to proceedings involving the release or detention of a person charged with violating a condition of probation or supervised release. The amendments make clear that only paragraph (a)(1) of § 3143, and not (a)(2), applies to the proceedings. The proposed amendments also clarify the burden of proof in such proceedings, which, under the case law, is to establish by *clear and convincing evidence* that the person will not flee or pose a danger to any other person or to the community.

The advisory committee decided not to proceed with proposed amendments to Rule 5 that were published for comment. The proposed amendments would have required a judge deciding whether to release or detain a defendant specifically to consider the right of a victim to be reasonably protected from the accused. The advisory committee concluded that the amendments were redundant of provisions in the Crime Victims' Rights Act (18 U.S.C. § 3771) and the Bail Reform Act (18 U.S.C. §§ 3141-3156).

The Committee concurred with the advisory committee's recommendations.

**Recommendation:** That the Judicial Conference —

Approve the proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1 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.

The proposed amendments to the Federal Rules of Criminal Procedure are in Appendix D, with an excerpt from the advisory committee report.

#### ***Rules Approved for Publication and Comment***

The advisory committee submitted proposed amendments to Rules 1, 3, 4, 9, 32.1, 40, 41, 43, and 49, and new Rule 4.1, with a request that they be published for comment. The Committee approved the advisory committee's recommendation to publish the proposed

amendments for public comment. The proposed amendments are designed to facilitate the use of technology in criminal case proceedings. Under certain circumstances set out in the proposed amendments, a law enforcement officer may transmit information to the court by reliable electronic means, including emails, instead of appearing before a judicial officer, and an accused may participate in some specified proceedings by video conferencing. Allowing such uses of technology responds to needs that are most acute in districts that cover huge areas, reducing the delays, security risks, burdens, and costs of traveling long distances for proceedings that no longer require physical presence to be fairly and effectively handled.

The proposed amendments to Rule 1 expand the definition of “telephone” to include cell phone technology and calls over the internet.

The proposed amendments to Rules 3, 4, and 9 authorize a court to consider complaints and requests for the issuance of arrest warrants and summonses based on information submitted by reliable electronic means. These rules changes are complemented by the proposed amendments to Rule 41, which authorize the return of a search, arrest, or tracking-device warrant by reliable electronic means.

Proposed new Rule 4.1 brings together in a single rule the procedures for using phones or other reliable electronic means to apply for, approve, or issue warrants, summonses, and complaints. The procedures governing requests for search warrants “by telephonic or other reliable electronic means” under Rule 41(d)(3) and (e)(3) have been relocated to this rule, reordered for easier application, and extended to arrest warrants, complaints, and summonses.

The proposed amendments to Rule 32.1 and Rule 40 allow a defendant to request or consent to appear by video teleconference in certain proceedings to revoke or modify probation or supervised release or in a proceeding involving an arrest for failing to appear in another

district or for violating conditions of release set in another district. Conforming amendments are also proposed to Rule 43, which would otherwise require the defendant's physical presence at the proceedings.

The proposed amendments to Rule 49 permit a court to allow, by local rule, papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference.

### ***Informational Items***

The advisory committee withdrew its request to publish for comment proposed amendments to Rules 12 and 34. The amendments would require a defendant to raise the failure to state an offense before trial consistent with the Supreme Court decision in *United States v. Cotton*, 535 U.S. 625, 631 (2002), which held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet "the plain-error test of Federal Rule of Criminal Procedure 52(b)." The advisory committee will continue to study the proposed amendments.

The advisory committee is also considering proposed amendments to Rule 32 to extend the rule's notice requirement to sentencing "variances" as well as sentencing "departures," and to provide the parties with the information given to and relied on by the probation officer writing the presentence report.

As part of its ongoing monitoring of the implementation of the Crime Victims' Rights Act, the advisory committee received a report from the Department of Justice about its biannual meetings with representatives of crime victims' organizations.

## FEDERAL RULES OF EVIDENCE

### *Rule Recommended for Approval and Transmission*

The Advisory Committee on Evidence Rules submitted proposed amendments to Rule 804(b)(3) with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed changes were circulated to the bench and bar for comment in August 2008. The scheduled public hearings on the proposed changes were canceled because no one asked to testify.

The proposed amendments to Rule 804(b)(3) require the government to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against penal interest. The current rule requires only the defendant to make such a showing. A number of courts have applied the corroborating-circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the rule does not so provide. A unitary approach to declarations against penal interest assures both the prosecution and the accused that the rule will not be abused and that only reliable hearsay statements will be admitted under the exception. The Department of Justice does not oppose the amendments.

The Committee concurred with the advisory committee's recommendations.

**Recommendation:** That the Judicial Conference —

Approve the proposed amendments to Evidence Rule 804(b)(3) 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.

The proposed amendments to the Federal Rules of Evidence are in Appendix E, with an excerpt from the advisory committee report.

### *Rules Approved for Publication and Comment*

The Advisory Committee on Evidence Rules submitted proposed amendments to

Rules 801-1103 with a request that they be published for comment. The proposed amendments are the final 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 801-1103, along with restyled Rules 101-706, which were approved earlier but deferred for publication so that all the proposed restyling amendments to the Evidence Rules could be published in a single package.

### ***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**

At the request of several judges on circuit councils and in response to concerns expressed by lawyers, the Committee in early 2007 embarked on a study of the use of standing and general orders in district courts. In particular, the Committee was asked for guidance about the delineation between local rules and standing or general orders and about ways to improve access to standing or general orders on court web sites.

The Committee studied the general and standing orders and local rules in district courts posted on the courts’ web sites and sent a survey to the chief district judge and chief bankruptcy judge of every district to obtain judges’ views and suggestions. The Committee concluded that courts and judges have had difficulty in defining what subjects are appropriately addressed in standing or general orders on the one hand or in local rules on the other hand, primarily because

there are no national standards and very few local standards. Courts have also had difficulty in ensuring that standing or general orders are readily accessible to lawyers and litigants.

At its January 2009 meeting, the Committee considered a draft report and proposed voluntary guidelines — not rule changes that would impose requirements on courts — on standing and general orders. The report and guidelines were based on the results of the study and survey. 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 and access. The guidelines delineate matters appropriately addressed in standing or general orders and those appropriately addressed in local rules. In general, standing orders may be appropriate for internal administrative matters, emergency matters, transitory problems and issues, and rules of courtroom conduct that do not bear on substantive rules of practice. On the other hand, local rules are more appropriate to address filing, pretrial practice, motion practice, and other requirements imposed on litigants and lawyers. The guidelines also highlight ways to make standing and general orders on specific topics easier to find. The report and guidelines were revised in light of comments by members at the Committee meeting.

At its June 2009 meeting, the Committee unanimously agreed to forward the guidelines to the Judicial Conference with a recommendation that it adopt the guidelines and transmit them to the courts.

**Recommendation:** That the Judicial Conference —

*Approve the proposed Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Web Site and transmit them, along with an explanatory report, to the courts.*

The proposed guidelines are in Appendix F, with an accompanying Committee report.

## **LONG-RANGE PLANNING**

The Committee reviewed a draft report from the Ad Hoc Advisory Committee on  
Judiciary Planning on judiciary-wide strategic issues in light of its rulemaking responsibilities.

Respectfully submitted,

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Appendix A – Proposed Amendments to the Federal Rules of Appellate Procedure  
Appendix B – Proposed Amendments to the Federal Rules of Bankruptcy Procedure  
Appendix C – Proposed Amendments to the Federal Rules of Civil Procedure  
Appendix D – Proposed Amendments to the Federal Rules of Criminal Procedure  
Appendix E – Proposed Amendments to the Federal Rules of Evidence  
Appendix F – Proposed Guidelines for Distinguishing Between Local Rules and Standing  
Orders