Agenda E-19 (Summary)
Rules
March 2012

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 Criminal Rule 16, 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. 8-9

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

NOTICE
NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE 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 (Committee) met on January 5–6, 2012. All members attended, except Larry D. Thompson, Esq., who participated by telephone, and *ex officio* member Deputy Attorney General James M. Cole. Elizabeth Shapiro, Esq., attended on behalf of the Department of Justice.

Representing the advisory rules committees were: Judge Jeffrey S. Sutton, Chair, and Professor Catherine T. Struve, 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, Professor Sara Sun Beale, Reporter, and Professor Nancy J. King, Associate Reporter, of the Advisory Committee on Criminal Rules; and Chief Judge Sidney A. Fitzwater, Chair, and Professor Daniel J. Capra, Reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Professor Daniel R. Coquillette, the Committee's Reporter; Peter G. McCabe, the Committee's Secretary; Professor R. Joseph Kimble, style consultant to the Committee; Jonathan C. Rose, Chief of the Administrative Office's Rules

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Committee Support Office; Dr. Joe S. Cecil of the Federal Judicial Center; and Andrea L. Kuperman, Chief Counsel to the Rules Committees.

FEDERAL RULES OF APPELLATE PROCEDURE

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

Informational Items

The Appellate and Bankruptcy Advisory Rules Committees have been working together on a proposal to amend Appellate Rule 6 to ensure that the rule dovetails with the contemplated amendments to Part VIII of the Bankruptcy Rules. The proposed amendments to Rule 6 under review would update that rule's cross-references to the Bankruptcy Part VIII Rules; would amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling; would add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2); and would revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal. The advisory committee is continuing to work on this proposal and to determine the appropriate time for proceeding with it.

At its October 2011 meeting, the advisory committee discussed possible amendments to the appellate rules to take account of the shift to electronic filing and service. There are a significant number of appellate rules that could be affected by such a project, and the advisory committee would seek to coordinate any work in furtherance of this project with that of the other advisory committees. At its January meeting, the Committee formed a subcommittee to consider terminology addressing electronic filing that may affect multiple sets of rules. The advisory committee is examining several other issues, including a proposal to address the sealing or redaction of briefs or record materials on appeal, and a proposal to amend Rule 28 to authorize

the inclusion of introductions in appellate briefs. It also continues to consider a proposal to treat federally recognized Native American tribes the same as "states" for the purpose of amicus filings. The chair of the advisory committee has written to the chief judge of each circuit to seek input on the desirability of adopting such a proposal and the advisory committee expects to consider responses at its April 2012 meeting.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules Approved for Publication and Comment

The advisory committee submitted proposed amendments to Bankruptcy Rules 7054 and 7008(b) with a recommendation that they be published for public comment. The Committee approved the advisory committee's recommendation.

Rule 7054 would be amended to make applicable in adversary proceedings most of the provisions regarding attorney's fees in Civil Rule 54(d)(2). Rule 7008(b), which requires pleading a claim for attorney's fees in the complaint or other appropriate pleading, would be deleted. The proposed amendments seek to clarify the procedure for pursuing an award of attorney's fees and promote uniformity with the corresponding civil rule. By bringing the Bankruptcy Rules into closer alignment with the Civil Rules, this proposed amendment eliminates a potential trap for an attorney, particularly one familiar with the Civil Rules, who might overlook the Rule 7008(b) requirement to plead a request for attorney's fees as a claim in the complaint, answer, or other pleading.

Informational Items

As discussed above, the advisory committee, with significant assistance from the Advisory Committee on Appellate Rules, is continuing several years of work on a comprehensive revision of Part VIII of the Bankruptcy Rules, which addresses appeals to district courts and

bankruptcy appellate panels, to adopt a clearer and simpler style, to align the Part VIII rules more closely with the Appellate Rules, and to make the Part VIII rules reflect the fact that most records in bankruptcy cases are filed, maintained, and transmitted in electronic format. At its October 2011 meeting, the advisory committee reviewed the first half of the comprehensive Part VIII draft and accompanying committee notes. The advisory committee will review the second half of the revised Part VIII rules at its March 2012 meeting, and will seek to have the proposed Part VIII revisions published for public comment in August 2012.

The advisory committee continues to monitor case law developments following the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The case touches on the power of bankruptcy judges to enter final judgments in disputes before them, and has garnered a high level of interest among the bankruptcy courts and the Article III courts. The post-*Stern* landscape is rapidly developing and the advisory committee continues to assess whether there is a need for responsive rulemaking in light of continuing developments.

The advisory committee is continuing its work revising and modernizing the bankruptcy forms. It will likely seek the Committee's approval for publication of a package of new forms for individual debtors in August 2012.

FEDERAL RULES OF CIVIL PROCEDURE

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

Informational Items

The advisory committee is studying possible rulemaking responses to concerns about preservation obligations and spoliation sanctions. In early 2011, the advisory committee's discovery subcommittee developed three drafts of possible preservation rules following suggestions received from panelists at the May 2010 Conference on Civil Litigation sponsored by

the advisory committee and held at Duke University School of Law (2010 Conference). The first draft provided specific guidance, defining preservation obligations in considerable detail. The second focused on general obligations of reasonable behavior. The third focused on sanctions, relying on backward inference to shape preservation obligations. These drafts were sent to a diverse group of judges, lawyers, technology experts, and e-discovery experts, who then came together with members of the discovery subcommittee and other advisory committee members for a miniconference in Dallas, Texas in September 2011.

Discussion at the miniconference generated considerable disagreement about the steps that might be taken to address preservation problems, and even disagreement about whether the time has come to begin to consider draft solutions. The advisory committee is approaching this important task with due care and has concluded that there is much yet to learn. The discovery subcommittee is continuing its in-depth consideration and has left all related issues open for discussion and further study. The subcommittee will be supplementing its report to the advisory committee in March 2012.

The advisory committee is continuing to examine the standards that apply to motions to dismiss for failure to state a claim upon which relief can be granted in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S 662 (2009). The advisory committee continues to study and monitor the lower courts' application of the Supreme Court decisions and the effect of those decisions on rates of filing of motions to dismiss and rates of grants or denials in different kinds of cases. At the request of the advisory committee, the Federal Judicial Center (FJC) conducted an empirical analysis of experience with Civil Rule 12(b)(6) motions to dismiss for failure to state a claim, which examined motions to dismiss filed in periods shortly before the *Twombly* decision and after the

Iqbal decision, including the rates of filing motions to dismiss, rates of granting motions, and the frequency of granting leave to amend. The first phase of the FJC's study found that motions to dismiss for failure to state a claim are being made more frequently after *Twombly* and *Iqbal*, and it concluded, after applying multinominal corrections to account for different types of cases, different practices in different courts, and the presence of an amended complaint, and apart from "financial instrument" cases, that there was no statistically significant increase in the rate of granting motions to dismiss. A second phase is examining what happens when a motion to dismiss is granted with leave to amend. The initial conclusion of the second phase has been that there was no statistically significant increase in plaintiffs excluded by motions to dismiss for failure to state a claim or in cases terminated by such motions, but the work in this stage is still in progress and the possibility of undertaking a further study to explore practice on all motions to dismiss is being explored as well.

A subcommittee formed after the 2010 Conference is continuing to implement and oversee further work on ideas resulting from that conference. The subcommittee is working with the FJC to identify pilot projects in federal courts around the country and to encourage structuring the projects in ways that will support rigorous analysis of the results. The FJC is also studying practices at the outset of litigation, including the initial scheduling orders and Rule 16(b) conferences, as well as Rule 26(f) discovery planning conferences, and the results of those studies will inform the subcommittee's work. The subcommittee has also facilitated the development of a protocol for initial discovery in employment cases, drafted by a group of experienced lawyers, including some representing primarily plaintiffs and others representing primarily defendants. The employment protocol will be made available to all federal courts, with encouragement to judges to adopt it for use in their employment cases. As part of the

subcommittee's efforts to study ways to reduce costs and delays, it organized a panel of distinguished judges and practitioners from the Eastern District of Virginia, which uses accelerated civil case management practices, for the most recent advisory committee meeting.

The 2010 Conference subcommittee is also studying many possible rulemaking responses to issues raised at the conference, including a proposal to revise Rule 26(d)'s moratorium on discovery requests before the Rule 26(f) conference and a suggestion to establish presumptive numerical limits on certain types of discovery.

The advisory committee is evaluating whether the rules governing class-action practice should be revisited in the near term. The most recent phase of class-action work began in 1991 and culminated with amendments that took effect in 1996 and 2003. Since then, the Class Action Fairness Act of 2005 has brought new and different kinds of class actions to the federal courts, and the Supreme Court has rendered a number of important class-action decisions. The advisory committee has established a subcommittee to begin initial consideration of several recurring class-action issues. A panel at the Committee's January meeting discussed issues that have arisen in the case law and in practice in litigating class actions and possibilities for addressing certain class action issues through rulemaking.

The advisory committee continues to consider the role of civil pleading forms and whether they should continue to be subject to the full Rules Enabling Act process. Different advisory committees take different approaches to the forms, and the committees are making progress with a joint project under the Standing Committee's guidance to determine how forms should be handled going forward.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted a proposed amendment to Rule 16, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment is a technical and conforming amendment to correct what courts have treated as "scrivener's error" in the 2002 restyling of Criminal Rule 16 concerning the protection afforded to government work product. Because this is a technical and conforming amendment, publication for public comment was unnecessary.

In 2011, a district judge brought the decision in *United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004), to the advisory committee's attention. The *Rudolph* court identified what it characterized as a "scrivener's error" in the restyling of Rule 16. Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy "books, papers, [and] documents" material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs — not including Rule 16(a)(1)(C) — Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that "a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product in connection with his case." *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

With one exception not relevant to this issue, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesignated as subparagraph (a)(1)(E)), some courts

have been urged to construe the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener's error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules.

Although the courts have employed the doctrine of the scrivener's error to read Rule 16 to avoid an unintended change in the protection afforded to work product, the advisory committee concluded that the Rule itself should be amended so that courts do not have to resort to a doctrine that is invoked only to correct drafting errors. By restoring the enumerated subparagraphs, the amendment makes clear that a defendant's pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

> **Recommendation:** Approve the proposed amendment to Criminal Rule 16, 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.

Informational Items

The advisory committee is analyzing a proposal from Attorney General Eric H. Holder, Jr. to amend Rule 6(e)'s provisions regarding grand jury secrecy to authorize the disclosure of historically significant grand jury materials after a suitable period of years, subject to various limitations and procedural protections. The proposal responds to the recent decision granting access to President Richard Nixon's testimony before the Watergate grand jury, *In re Petition of Kutler*, No. 10-547, 2011 WL 3211516 (D.D.C. July 29, 2011), and to earlier decisions that granted access to grand jury materials in cases involving the espionage investigation of Alger

Hiss, the espionage indictment of Julius and Ethel Rosenberg, and the jury-tampering indictment of Jimmy Hoffa. These decisions relied on the courts' inherent authority, rather than Rule 6(e), to authorize disclosure in special circumstances. In the Attorney General's view, however, the courts have no inherent authority to authorize disclosures not provided for under Rule 6. The proposed amendment is intended to recognize the public's interest in gaining access to records casting light on important historical events while continuing to protect grand jury secrecy. The advisory committee believes that the proposal warrants in-depth consideration, and a newly formed subcommittee will report on its preliminary findings at the advisory committee's April 2012 meeting.

FEDERAL RULES OF EVIDENCE

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

Informational Items

The advisory committee is continuing to examine a suggestion that Evidence Rule 801(d)(1)(B) — the hearsay exemption for certain prior inconsistent statements — be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility. Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility are also admissible substantively under the hearsay exemption, but other rehabilitative statements are admissible only for rehabilitation and not substantively under the hearsay exemption. The justification for amending the rule is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

The advisory committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). Other than the proposed amendment to Rule 803(10), which has been published for public comment, nothing in the developing case law appears to require amending the Evidence Rules at this time.

The advisory committee sponsored a successful symposium on the restyled Rules of Evidence in conjunction with its Fall 2011 meeting at the William & Mary Law School. The proceedings of the symposium will be published on an expedited schedule in the *William and Mary Law Review* in March 2012.

FIVE-YEAR REVIEW OF COMMITTEE JURISDICTION AND STRUCTURE

In accordance with the Judicial Conference's requirement to perform a self-evaluation every five years, the Committee reviewed its jurisdictional statement, completed the self-evaluation questionnaire for consideration by the Executive Committee, and recommends that the Committee and each advisory rules committee be retained, and that no change should be made to the Committee's jurisdictional statement.

Respectfully submitted,

Mark R. Kravitz, Chair

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

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

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

To: **Hon. Mark R. Kravitz, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Reena Raggi, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **December 12, 2011**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on October 31, 2011, in St. Louis, Missouri, and took action on a number of proposals. The Draft Minutes are attached.

This report presents one action item: the Committee's recommendation that a proposed amendment to Rule 16 (discovery and inspection) be approved and transmitted to the Judicial Conference as a technical and conforming amendment.

* * * * *

II. Action Item—Rule 16

Earlier this year, Judge Lee Rosenthal brought the decision in *United States v. Rudolph,* 224 F.R.D. 503 (N.D. Ala. 2004), to the Committee's attention. The *Rudolph* court identified what it characterized as a "scrivener's error" in the restyling of Rule 16 concerning the protection afforded to government work product. The purpose of the proposed amendment is to clarify that the 2002 restyling of the rule made no change in the protection afforded to government work product.

Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy "books, papers, [and] documents" material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs–not including Rule 16(a)(1)(C)–Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that "a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product." *United States v. Armstrong,* 517 U.S. 456, 463 (1996).

With one exception not relevant here, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesignated as subparagraph (a)(1)(E)), some courts have been urged to construe the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product by that Rule. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener's error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules. *See, e.g.*, *United States v. Rudolph*, 224 F.R.D. 503, 504-11 (N.D. Ala. 2004), and *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007) (adopting the *Rudolph* court's analysis).

Although the courts have employed the doctrine of the scrivener's error to read Rule 16 to avoid an unintended change in the protection afforded to work product, the Advisory Committee concluded that the Rule itself should be amended so that courts do not have to resort to a doctrine that is invoked only to correct drafting errors. By restoring the enumerated subparagraphs, the amendment makes it clear that a defendant's pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

The Committee voted unanimously to approve the proposed amendment,[1] and agreed to review and vote on proposed note language by email. Note language proposed by the chair and reporters was subsequently approved by the Committee in an email vote.

The Committee discussed the question whether the proposed amendment could be treated as a technical and conforming change, which would not require publication for public comment. Members generally agreed that the expedited procedure for technical amendments would be appropriate because the change was of a technical nature, merely correcting what courts have correctly treated as a "scrivener's error." But one member expressed concern that without the opportunity for a full notice and comment period there might be a mistaken view that the change was depriving defendants of a right to disclosure under the present rule. Finally, members acknowledged that whether a rule change is technical and conforming, or sufficiently substantive to require a full public comment period, would be determined by the Standing Committee.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 16 be approved as a technical and conforming amendment and submitted to the Judicial Conference.

* * * * *

[1] Following the meeting, at the suggestion of the Advisory Committee's style consultant, Professor Kimble, the cross reference to "Rule 16(2)(1)(A), (B), (C), (D), (F), and (G)" was revised to read "Rule 16(2)(1)(A)-(D), (F), and (G)."

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

* * * * *

(2) ***Information Not Subject to Disclosure.*** Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G) ~~Except as Rule 16(a)(1) provides otherwise~~, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of

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

statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Committee Note

Subdivision (a). Paragraph (a)(2) is amended to clarify that the 2002 restyling of Rule 16 did not change the protection afforded to government work product.

Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy "books, papers, [and] documents" material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs–not including Rule 16(a)(1)(C)–Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that "a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product." *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

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the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product by that Rule. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener's error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules. *See, e.g.*, *United States v. Rudolph*, 224 F.R.D. 503, 504-11 (N.D. Ala. 2004), and *United States v. Fort*, 472 F.3d 1106, 1110 n.2 (9th Cir. 2007) (adopting the *Rudolph* court's analysis).

By restoring the enumerated subparagraphs, the amendment makes it clear that a defendant's pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).